163 U.S. 698

RECORD, CASE No. 14,953.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., ~~1470.~~ 998 ~~807~~ ~~300~~

THE NEW YORK AND NEW ENGLAND RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

HARRIET S. RUMSEY, HARRIET M. RUMSEY, JULIA RUMSEY, AND LIZZIE RUMSEY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED DECEMBER 30, 1891.

RECORD, CASE No. 14,953.

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OCTOBER TERM, 1891.

TERM No., 1479.

THE NEW YORK AND NEW ENGLAND RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

HARRIET S. RUMSEY, HARRIET M. RUMSEY, JULIA RUMSEY, AND LIZZIE RUMSEY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 18, 1892.

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Court of Appeals.

HARRIET S. RUMSEY and Others, Respondents,
against
THE NEW YORK AND NEW ENGLAND RAILROAD COMPANY, Appellant.

Appeal Book.

W. C. Anthony, attorney for appellant; H. H. Hustis, attorney for respondents.

1

Supreme Court.

Trial Desired in Dutchess County.

HARRIET S. RUMSEY, HARRIET M. RUMSEY, JULIA RUMSEY, and LIZZIE RUMSEY
against
THE NEW YORK AND NEW ENGLAND RAILROAD COMPANY.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiffs' attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Dated July 9th, 1885.

H. H. HUSTIS,
Plaintiffs' Attorney.

Office and post-office address: Fishkill Landing, Dutchess county, New York.

Supreme Court, Dutchess County.

HARRIET S. RUMSEY, HARRIET M. RUMSEY, JULIA RUMSEY, and LIZZIE RUMSEY
against
THE NEW YORK AND NEW ENGLAND RAILROAD COMPANY.

The above-named plaintiffs respectfully show to this court:

I. That they are the owners of certain uplands situated in the village of Fishkill Landing, in the county of Dutchess and State of New York, and have been such owners for more than 10
2 years last past, and said lands are bounded on the westerly side thereof by the Hudson river, said lands running along the said Hudson river about 1,000 feet.

II. The said plaintiffs further allege that they are the owners of the land under the water of said Hudson river in front of and adjacent to the upland above described, running from high-water mark to the channel bank of said river, being about 1,000 feet on

the shore line and about the same distance along the channel bank of said river by about 2,000 feet from the shore line to said channel bank, excepting therefrom the rights of the New York Central and Hudson River Railroad Company.

III. The plaintiffs further allege that said defendant is a railroad corporation, duly incorporated under and by virtue of the laws of the State of New York and running and operating said road from the Hudson river, at Fishkill Landing, easterly to the city of Boston, and have been operating said road for more than three years last past.

IV. The said plaintiffs further show that said defendant has built its road-bed upon the lands under the water of the Hudson river which are owned by said plaintiffs and described in paragraph 2 of this complaint without any permission, right, or authority from said plaintiffs, and is now and has been ever since the construction of said road-bed running and operating its road about 1,000 feet across the said lands of said plaintiffs.

Wherefore said plaintiffs demand judgment against the defendant that a judgment or decree may be made and entered in this action enjoining, restraining, and prohibiting the said defendant from running and operating its railroad upon the said lands of said plaintiffs or of entering upon the said lands of said plaintiffs by its agents or servants for any purpose in operating said railroad, and for such other relief as may be just and proper in the premises, and for the costs of this action.

H. H. HUSTIS,
Pl'ffs' Att'y, Fishkill Landing, N. Y.

3 Supreme Court.

HARRIET S. RUMSEY and Others
against
THE NEW YORK AND NEW ENGLAND RAILROAD COMPANY.

The defendant, for answer to the complaint herein, says:

1st. That it denies on information and belief that the plaintiffs own the land under the waters of the Hudson river mentioned and described in paragraph II of said complaint; and on information and belief the defendant alleges that the grant or conveyance under which the plaintiffs claim or pretend to own said land under water is null and void.

2nd. On information and belief the defendant further denies that the plaintiffs own land bounded on the westerly side thereof by the Hudson river, as stated in paragraph I of said complaint.

3rd. The defendant further denies the allegations contained in paragraphs III and IV of said complaint, wherein it is stated that this defendant is running and operating a railroad across or upon the lands under water referred to and described therein; but, on the contrary, this defendant states that on or about the 1st day of January, 1884, one Charles P. Clark was duly appointed by the order of the United States circuit court for the district of Connecticut the receiver of all the goods, chattels, property, franchises, rights, and

easements of the defendant; that said Clark duly qualified as such receiver and entered upon the discharge of the duties of his trust as such; that he is still such receiver and acting as such; that as such he now has and has constantly had ever since January 1st, 1884, the entire, absolute, and uninterrupted possession, use, management, and control of all the property, estate, franchises, goods, and chattels of this defendant, and that whatever has been done since the date last aforesaid in the nature of trespasses upon the plaintiffs' lands or elsewhere along the line of the railroad formerly controlled by this defendant is the act and deed of said receiver and not of this defendant.

The defendant therefore asks that it may be hence dismissed with the costs of this action in its favor.

WALTER C. ANTHONY,
Def't's Att'y.

Supreme Court.

HARRIET S. RUMSEY and Others
against
THE NEW YORK AND NEW ENGLAND RAILROAD COMPANY.

The defendant, for an amended answer to the plaintiffs' complaint herein, says:

1st. That it denies on information and belief that the plaintiffs own the land under the waters of the Hudson river mentioned and described in paragraph II of said complaint; and on information and belief the defendant alleges that the grant or conveyance under which the plaintiffs claim or pretend to own said land under water is null and void for the reason that said grant and the statute under which it was granted (Laws of New York for 1850, chapter 283) are repugnant to the constitution of the State of New York and to the Constitution and laws of the United States.

2nd. On information and belief the defendant further denies that the plaintiffs own land bounded on the westerly side thereof by the Hudson river, as stated in paragraph I of said complaint.

3rd. The defendant further denies the allegations contained in paragraphs III and IV of said complaint, wherein it is stated that this defendant was then running and operating a railroad across or upon the lands under water referred to and described therein; but, on the contrary, this defendant states that on or about the first day of January, 1884, one Charles P. Clark was duly appointed by the order of the United States circuit court for the district of Connecticut the receiver of all the goods, chattels, property, franchises, rights, and easements of the defendant; that said Clark duly qualified as such receiver; that as such he had during all the years 1884 and 1885 the entire, absolute, and uninterrupted possession, use, management, and control of all the property, estate, franchises, goods, and chattels of this defendant, and that whatever was done during said period in the nature of trespass upon the plaintiffs' land or elsewhere along the line of the railroad formerly

controlled by this defendant was the act and deed of said receiver and not of this defendant.

The defendant therefore asks that it may be hence dismissed with the costs of this action in its favor.

WALTER C. ANTHONY,
Defendant's Attorney.

This action was brought to trial before Mr. Justice Barnard, without a jury, at the court-house in the city of Poughkeepsie, N. Y., on the fifth day of July, 1889, and the following testimony was taken:

The plaintiffs offered in evidence the deed from Albert Chrystie and wife to Harriet Gill and James S. Rumsey, dated May 1st, 1833, and recorded in the Dutchess county clerk's office August 20th, 1883, in Book 51 of Deeds, page 328 (Plaintiffs' Exhibit 1).

Also the last will, &c., of James S. Rumsey, dated October 2d, 1861, probated November 26th, 1872, and recorded in the office of the surrogate of Dutchess county, in Book 2 of Wills, page 57 (Plaintiffs' Exhibit 2).

Also letters patent from the commissioners of the land office to Harriet S. Rumsey and others, dated March 3d, 1885, and recorded in the office of the clerk of Dutchess county, March 3d, 1885, in Book 220 of Deeds, page 339 (Plaintiffs' Exhibit 3).

It is admitted that James S. Rumsey died in the year 1872,
6 and that the grantees in the aforesaid letters patent are the widow and children of said James S. Rumsey.

H. H. HUSTIS, sworn for the plaintiffs, testified as follows:

I know the location of the defendant's railroad on the Rumsey property. The track runs over the land under water, described in said letters patent, nearly 1,000 feet; said railroad was built before the grant was made. The application for the grant was filed in December, 1881. The defendant's road was built in 1881, and not finished, I think, in December, 1881. The land described in the deed from Chrystie to Gill and Rumsey is the upland adjacent to the water grant. Gill is dead. Rumsey was her son and only child, and inherited her interest in said uplands. She died intestate.

On cross-examination he testified:

The defendant's trestle is on the land described in the water grant. I know the west limit of the Hudson River Railroad Company's land—about; it is about seventy-five feet west of the centre line of the tracks. I know that defendant's trestle is on the plaintiffs' water grant, because it is more than seventy-five feet west of that centre line. The upland of the plaintiffs is east of the Hudson River railroad—all except the dock shown on map A, which is west of that railroad. The Hudson River Railroad Company built the dock for the plaintiffs, I think; am sure that company built the culvert shown on map A. The dock west of the Hudson River railroad was built after that railroad was constructed.

On redirect examination he testified:

The map "A" is correct. Before the Hudson River railroad was built the land where it now is was under water. It is built on made land. Sargent was dead when the water grant was made. I knew James S. Rumsey; he farmed the property for many years; he lived there before his death. The plaintiffs have lived there ever
7 since, and live there now. Harriet Gill resided in Fishkill; think she has been dead twenty-five years. She resided with her son, and died on the premises.

Plaintiffs rest.

The defendant moved for a nonsuit on the ground that no cause of action had been proved. The motion was denied and the defendant excepted.

The defendant offered in evidence a deed from James S. Rumsey and wife and Harriet Gill to the Hudson River Railroad Company, dated December 6th, 1847, recorded January 8, 1848, in Book 86 of Deeds, at page 75, in the clerk's office of Dutchess county.

The plaintiffs objected to its reception in evidence. The objection was overruled, and the plaintiffs excepted. Deed read (Defendant's Exhibit 1).

The defendant also offered in evidence the map of the Hudson River Railroad Company filed September 30th, 1868, and that filed December 1st, 1868. The plaintiffs objected to their reception in evidence. The objection was overruled, and the plaintiffs excepted. The maps were received in evidence and marked Defendant's Exhibit 2 and Defendant's Exhibit 3, respectively.

The defendant also offered in evidence a certified copy of a grant from the Commissioners of the Land Office to the Hudson River Railroad Company, dated December 26th, 1873, recorded in the office of the secretary of state of the State of New York, in Book 42 of Patents, at page 690.

The plaintiffs objected to its reception in evidence. The objection was overruled, and the plaintiffs excepted. The instrument was read in evidence (Defendant's Exhibit 4).

The defendant also read in evidence a copy of chapter 283 of the Laws of N. Y. of the Year 1850 and a certified copy of the certificates on the original bill, stating the vote by which such bill passed the senate and assembly respectively. The act was marked Defendant's Exhibit No. 5, and the certificates Defendant's Exhibit No. 6.

IRVIN C. HEATH, being sworn for the defendant, testified as follows:

I am an engineer and surveyor. I have made a map of
8 the premises in question; it shows correctly the location of the defendant's railway, of the Hudson River railroad, and of the shore line of the river. I have inspected the maps of the Hudson River Railroad Company filed in September and in December, 1868. The defendant's railway at the point in dispute falls

partly east and partly west of the west line of the Hudson River Railroad Company's lands, as shown on those maps.

Maps offered in evidence. Objected to by the plaintiffs. Objection overruled, and the plaintiffs excepted. Map received and marked Defendant's Exhibit No. 7.

Defendant offers in evidence a certified copy of the order of the United States circuit court in the case of Brown *vs.* N. Y. & N. E. R. R. Co. Plaintiffs object to its reception. Objection overruled, and plaintiffs except. Defendant's Exhibit No. 8.

WALTER C. ANTHONY, being sworn for the defendant, testified as follows:

Since this action was tried before, the receiver, Mr. Clark, has been discharged from that office and the road turned over to the defendant company, which is now operating the same.

The road runs through several States and is incorporated under the laws of the States into which it runs, including the State of New York. It is admitted that the roadway running along plaintiffs' water front, marked road on plaintiffs' map, is a highway.

The defendant rested.

H. H. HUSTIS, recalled for the plaintiffs, testified:

I had maps made when plaintiffs' water grant was applied for—"A" is one, the other was filed in the secretary of state's office. The culvert under the Hudson River railroad (map A) was not on the land north of Rumsey's; the dock and tramway were not there when the Hudson River railroad was built; then vessels could be loaded inside that railroad. After that railroad was built a track was laid out to it and a dock built outside, to which dock the tram-
9 way went. There was a dock on the Rumsey property before the Hudson River railroad was built. It was at the point marked X on map A.

The plaintiffs here rested, and the case was closed. The defendant again moved for a nonsuit on the same ground as before, and also because it appeared that the action should have been brought against the receiver.

The motion was denied, and the defendant excepted.

The foregoing was all the testimony introduced on the trial of this action.

PLAINTIFFS' EXHIBIT No. 1.

Albert Chrystie and Wife
to
Harriet Gill and James S. Rumsey.

Warranty deed dated May 1st, 1833. Recorded in Dutchess county clerk's office on the 20th day of August, 1833, in Liber 51, page 328.

This deed conveys the upland now belonging to the plaintiffs.

PLAINTIFFS' EXHIBIT No. 2.

Will of James S. Rumsey, admitted to probate and recorded in Dutchess county surrogate's office, gives all his property to his wife Harriet during her life, and after her death to his children in equal shares.

PLAINTIFFS' EXHIBIT No. 3.

The People of the State of New York, by the grace of God free and independent, to all to whom these presents shall come, Greeting:

Know ye that, pursuant to a resolution of the commissioners of our land office for the purpose of promoting the commerce of our said State or for the beneficial enjoyment by the adjacent owner and for no other object or purpose whatsoever and with the
10 reservations and upon the conditions hereinafter mentioned, we have given and granted, and by these presents do give and grant, unto Henry W. Sargent, executor of the last will and testament of James S. Rumsey, deceased; Harriet M. Rumsey, Julia Rumsey, and Lizzie Rumsey, their heirs and assigns, the land under water and between high and low water mark described as follows, to wit:

All that parcel of land under the waters of the Hudson river, in the town of Fishkill, Dutchess county, in front of uplands owned by the said Harriet M. Rumsey and others, which premises hereby conveyed are bounded as follows, viz:

Beginning at high-water mark of east shore of Hudson river at southwesterly corner of upland of Mrs. Caroline A. W. Brett, and running thence along the southerly line of lands under water heretofore granted to said Caroline A. W. Brett N. 78 degrees W. two thousand fifty feet to the southwesterly corner of said lands; thence S. 12 degrees W. nine hundred forty-five feet to the northwesterly corner of lands heretofore granted to the Boston, Hartford & Erie Railroad Company; thence along the northerly line of the said lands two thousand thirty-eight feet to high-water mark of said river; thence along said high-water mark northerly about one thousand feet to the place of beginning, containing forty-six and nine-tenth- acres, more or less;

Excepting and reserving therefrom the rights of the New York Central and Hudson River Railroad Company;

Excepting and reserving to all and every the said people the full and free right, liberty, and privilege of entering upon and using all and every part of the above-described premises in as ample a manner as they might have done had this power and authority not been given until the same shall have been actually appropriated and applied to the purposes of commerce by erecting a dock or docks thereon or for the beneficial enjoyment of the same by the adjacent owner.

In testimony whereof we have caused these our letters to
11 be made patent and the great seal of our said State to be hereunto affixed.

Witness David B. Hill, governor of our said State, at our
[L. S.] city of Albany, the third day of March, in the year of our Lord one thousand eight hundred and eighty-five.

DAVID B. HILL.

Passed the secretary's office the third day of March, 1885.

ANSON S. WOOD,
Deputy Secretary of State.

STATE OF NEW YORK, }
Office of the Secretary of State, } ss:

I hereby certify that the foregoing patent is issued pursuant to a resolution of the commissioners of the land office passed March 3rd, 1885, and of record in Book No. 18, at page 36, of Land Office Minutes.

Witness my hand and the seal of office of the secretary of
[L. S.] state, at the city of Albany, this third day of March, 1885.

ANSON S. WOOD,
Deputy Secretary of State and Clerk of Land Com's.

DEFENDANT'S EXHIBIT No. 1.

This indenture, made the 6th day of December, 1847, between James S. Rumsey and Harriet S., his wife, of Fishkill, county of Dutchess and State of New York, and Harriet Gill, of the same place, of the first part, and the Hudson River Railroad Company, of the 2d part, witnesseth: That the said parties of the 1st part, for and in consideration of the sum of $2,500, lawful money of the United States of America, to them in hand paid by the said parties of the 2nd part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and by these presents do grant, bargain, sell, alien-, remise, release, convey, and confirm, unto the said parties of the 2nd part and
12 to their successors and assigns forever all that certain strip, piece, or parcel of land situate in Fishkill aforesaid, being part of the line, course, or way of the Hudson River railroad, containing in total length on the centre line of said road about 1,258 feet, more or less, through the lands and premises of the said parties of the 1st part as the same has been surveyed and located and more particularly shown on the annexed map, and to which map reference is hereby made, bounded as follows, to wit: Beginning at the division line between the lands of the parties of the first part and John Wiltse where the same is intersected by the centre line of said railroad, and running thence north 4 degrees west about 162 feet as measured on said centre line, and bounded on the east by a line commencing on said division line between said parties of the first part and John Wiltse, and running thence parallel with said centre line and 130 feet distant therefrom; thence running on same course about 216 feet as measured on said centre line, bounded on the east by a line gradually narrowing from 130 feet down to 50 feet distant from said centre line; thence on the

same course about 880 feet as measured on said centre line to the water in front of the division line of lands of said parties of the first part and James Wiltse, bounded on the east by a line running parallel with said centre line and 50 feet distant therefrom, and is bounded on the west side of said centre line as follows, to wit: Commencing at the aforesaid *said* place of beginning by a line beginning 100 feet distant from said centre line about 270 feet as measured on said centre line, and thence by a line running parallel with said centre line the distance of about 996 feet as measured on said centre line to the aforesaid northern termination of said centre line, 40 feet distant therefrom, containing above the high-water mark of the Hudson river one acre and seven hundred and five one-thousandths part of an acre of land and below said high-water mark one acre and eight hundred and eighteen one-thousandths of an acre, more or less—

Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion or reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said parties of the first part of, in, or to the above-described — and every part and parcel thereof, with the appurtenances:

To have and to hold the above granted and described premises, with the appurtenances, unto the said parties of the second part, their successors and assigns, to them and their proper use and behoof forever, according to the intent and meaning of the act incorporating said company and the act amendatory thereof and of any future acts extending or continuing the charter of said company, but subject to the provisions of said acts; and the said James S. Rumsey, for himself, his heirs, executors, and administrators, doth covenant, grant, and agree to and with the said parties of the second part, their successors and assigns, that the said parties of the first part, at the time of the sealing and delivery of these presents, are lawfully seized in fee of a good, absolute, and indefeasible estate of inheritance in fee simple of and in all and singular the above granted and described premises, with the appurtenances, and have good right, full power, and lawful authority to grant, bargain, sell, and convey the same in manner aforesaid; and the said James Rumsey, his heirs, the said premises in the quiet and peaceful possession of the said parties of the second part, their successors and assigns, against the said parties of the first part, their heirs, and against all and every person and persons whomsoever lawfully claiming — to claim the same shall and will warrant and by these presents forever defend.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

JAMES S. RUMSEY. [L. S.]
HARRIET S. RUMSEY. [L. S.]
HARRIET GILL. [L. S.]

Sealed and delivered in the presence of—
JOHN WILTSE.
As to James S. Rumsey and Harriet Gill.

14 DEFENDANT'S EXHIBIT No. 4.

The People of the State of New York, by the grace of God free and independent, to all to whom these presents shall come, Greeting:

Know ye that whereas the New York Central and Hudson River Railroad Company, a body corporate duly organized under, pursuant to, and by virtue of the laws of the State of New York, has applied to the commissioners of the land office for a grant of land belonging to us required for the purposes of its road; and whereas the terms of such grant of land have been agreed upon by and between our said commissioners and the said railroad company and the said company has kept and performed the said terms:

Now, therefore, this indenture witnesseth: That pursuant to a resolution of the commissioners of the land office made and adopted and in consideration of the sum of five hundred dollars, lawful money, and of the amount of the expenses of the committee of visitation of said commissioners by the said company paid into our State treasury, the receipt whereof is hereby acknowledged, the people of the State of New York have granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and by these presents do grant, bargain, sell, alien-, remise, release, convey, and confirm, unto the said The New York Central and Hudson River Railroad Company and to its successors and assigns forever—

All those certain lots, pieces, or parcels of land situate, lying, and being in our county of Westchester, under the waters of the Hudson river and its estuaries into which the tide sets and below original high-water line, embraced within the boundary lines of the Hudson River railroad (now the New York Central and Hudson River railroad) and within the boundary lines of a contemplated change in said railroad at one place as all said boundary lines are shown upon the maps thereof filed in the office of the clerk of our said county the eleventh day of June, 1868, and also filed with
15 the said commissioners of our land office on the following day and upon the map hereto annexed;

Also all those certain lots, pieces, and parcels of land situate, lying, and being in our county of Putnam, under the waters of the Hudson river and its estuaries into which the tide sets and below original high-water line, embraced within the boundary lines of the Hudson River railroad (now the New York Central and Hudson River railroad) as shown upon the map thereof filed in the office of the clerk of our said county on the eighteenth day of October, 1868, and with the said commissioners of our land office on the ninth day of October, 1868, and upon the map hereto annexed;

Also all those certain lots, pieces, and parcels of land situate, lying, and being in our county of Dutchess, under the waters of the Hudson river and its estuaries into which the tide sets and below original high-water line, embraced within the boundary lines of the

Hudson River railroad (now the New York Central and Hudson River railroad) as shown upon the maps thereof filed in the office of the clerk of our said county on the thirtieth day of September, 1868, the tenth day of November, 1868, and the first day of December, 1868, and also with the said commissioners of our land office on the ninth day of October, 1868, the twenty-first day of November, 1868, and the fifth day of December, 1868, and upon the map hereto annexed;

Also all those certain lots, pieces, and parcels of land situate, lying, and being in our county of Columbia, under the waters of the Hudson river and its estuaries into which the tide sets and below original high-water line, embraced within the boundary lines of the Hudson River railroad (now the New York Central and Hudson River railroad) as shown upon the maps thereof filed in the office of the clerk of our said county on the thirtieth day of March, 1869, and the first day of February, 1870, and also with the said commissioners of our land office on the thirty-first day of March, 1869, and the fourth day of February, 1870, and upon the map hereto annexed;

16 Also all those certain lots, pieces, and parcels of land situate, lying, and being in our county of Rensselaer, under the waters of the Hudson river and its estuaries into which the tide sets and below original high-water line, embraced within the boundary lines of the Hudson River railroad (now the New York Central and Hudson River railroad) as shown upon the map thereof filed in the office of the clerk of our said county on the thirty-first day of March, 1869, and also with the said commissioners of our land office on the same day and upon the map hereto annexed—

Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, rents, issues and profits thereof:

To have and to hold the above granted, bargained, and described premises, with the appurtenances, unto the said The New York Central and Hudson River Railroad Company, its successors and assigns, to its and their own proper use and behoof forever.

In testimony whereof we have caused these our letters to be made patent and the great seal of our said State to be hereunto affixed.

Witness the Honorable John A. Dix, governor of our said State, at our city of Albany, on the twenty-sixth day of December, in the year of our Lord one thousand eight hundred and seventy-three.

[L. S.]

JOHN A. DIX.

Passed the secretary's office the 26th day of December, 1873.

ANSON S. WOOD,
Deputy Secretary of State.

The map attached to this patent bears the following certificate:

"This is to certify that this map is a correct reduced copy of the maps of the New York Central and Hudson River railroad (late

Hudson River railroad) heretofore filed in the offices of the
17 respective clerks of the counties of Westchester, Putnam, Dutchess, Columbia, and Rensselaer, New York, 15th December, 1873.

"RUDOLPH ROSA, *Surveyor.*"

"Examined and approved by me this 24th December, 1873.

"W. B. TAYLOR,
"*State Engineer and Surveyor.*"

"I certify that this is the map referred to in the annexed grant to the New York Central and Hudson River Railroad Company.

"Albany, 24th Dec., 1873.

"ANSON S. WOOD,
"*Deputy Sec'y of State.*"

Examined and compared with the original.

ANSON S. WOOD,
Deputy Secretary of State.

STATE OF NEW YORK, } ss:
Office of the Secretary of State, }

I have compared the preceding copy of letters patent with the record thereof in this office, in Book Number 42 of Patents, at pages 690, etc., and I do hereby certify the same to be a correct transcript therefrom and of the whole thereof.

Witness my hand and the seal of office of the secretary of
[L. S.] state, at the city of Albany, the 8th day of September, one thousand eight hundred and eighty-five.

ANSON S. WOOD,
Deputy Secretary of State.

DEFENDANT'S EXHIBIT No. 5.

Chap. 283.

An act to amend the Revised Statutes relating to grants of land under water. Passed April 10, 1850, "by a two-third vote."

The people of the State of New York, represented in senate and assembly, do enact as follows:

§ 1. Section sixty-seven of article four of title five, chapter
18 nine of part first of the Revised Statutes, is hereby amended so as to read as follows: "The commissioners of the land office shall have power to grant in perpetuity or otherwise so much of the lands under the waters of navigable rivers or lakes as they shall deem necessary to promote the commerce of this State or proper for the purpose of beneficial enjoyment of the same by the adjacent owner, but no such grant shall be made to any person other than the proprietor of the adjacent lands, and any such grant that shall be made to any other person shall be void."

§ 2. The powers conferred on the commissioners of the land office by the 1st section of this act are hereby extended to lands under

water and between high and low water mark in and adjacent and surrounding Long island and to all that part of the county of Westchester lying on the East, or Hudson, river or Long Island sound, but no grant made under this act shall extend beyond any permanent exterior water line established by law, and nothing contained in this act shall authorize the commissioners of the land office to grant any lands under water belonging to the mayor, aldermen and commonalty of the city of New York nor to interfere with any property, rights, or franchises of said corporation of the city of New York or interfere with the rights of the Hudson River Railroad Company.

STATE OF NEW YORK, } ss:
Office of the Secretary of State, }

I have compared the preceding with the original law on file in this office, and do hereby certify that the same is a correct transcript therefrom and of the whole of said original law.

Given under my hand and the seal of office of the secre-
[L. S.] tary of state, at the city of Albany, this twenty-sixth day of June, in the year one thousand eight hundred and eighty-nine.

DIEDRICH WILLERS,
Dep. Secretary of State.

19 DEFENDANT'S EXHIBIT No. 6.

STATE OF NEW YORK:

In assembly, April 10, 1850.

This bill was read the third time and passed, two-thirds of all the members elected to the assembly being present on its final passage.

By order of the assembly:
F. C. DININNY,
Speaker pro tem.

STATE OF NEW YORK:

In senate, April 10th, 1850.

This bill was read the third time and passed, two-thirds of all the members elected to the senate voting in favor thereof.

By order of the senate:
JAMES M. COOK,
President pro tem.

STATE OF NEW YORK, } ss:
Office of the Secretary of State, }

I have compared the preceding copy of certificates with the original certificates appended to the original engrossed act, chapter 283, Laws of 1850, entitled "An act to amend the Revised Statutes relating to grants of land under water," passed April tenth, 1850, remaining on file in this office, and I do hereby certify the same to be a correct transcript therefrom and of the whole of said certificates.

Witness my hand and the seal of office of the secretary of
[L. S.] state, at the city of Albany, this second day of July, one thousand eight hundred and eighty-nine.

D. WILLERS,
Dep. Secretary of State.

20 DEFENDANT'S EXHIBIT No. 7.

UNITED STATES OF AMERICA, *District of Connecticut,* } *ss:*

I, Edwin E. Marvin, clerk of the circuit court of the United States for the district of Connecticut, do certify that the annexed [L. S.] papers are true copies of the original bill of complaint, answer, motion for receiver, &c.—

In the Matter of HENRY A. BRASSEY
against
THE NEW YORK AND NEW ENGLAND RAILROAD CO. *et als.*,

on file in said court.

In testimony whereof I have set hereto my name officially and the seal of said court, at Hartford, in said district, this 27th day of August, A. D. 1885.

E. E. MARVIN, *Clerk.*

In the Circuit Court of the United States for the Second Circuit, District of Connecticut.

HENRY A. BRASSEY
vs.
THE NEW YORK AND NEW ENGLAND RAILROAD Company; William T. Hart, Frederick J. Kingsbury, and Eustace C. Fitz, Trustees; Charles Brown, The New York, New Haven and Hartford Railroad Company, and The New York, Lake Erie & Western Railroad Company. } No. 438. In Equity.

Decree Appointing Receiver.

This cause came on to be heard at chambers, at Hartford, on the motion of the complainant for the appointment of a receiver of the New York and New England Railroad Company, on the 21 thirty-first day of December, A. D. 1883, and on the bill of said complainant, duly verified by oath, and the answer of said company thereto, as on file; and said complainant appeared in support of said motion, by Simeon E. Baldwin, his solicitor, and said company appeared and filed in court a copy of a vote passed by its board of directors on the thirty-first day of December, 1883, certified by its secretary, assenting to the granting of said motion, and said company also, by William Caleb Loring, its solicitor, assented before the court to the appointment of a receiver.

And said complainant produced in court the written assent of William T. Hart, Frederick J. Kingsbury, and Eustace C. Fitz, trustees, to his applying for a receiver of said company, and made due proof of the service of his notice for his said motion for a receiver on said Eustace C. Fitz, Frederick J. Kingsbury, and said company, and said Frederick J. Kingsbury appeared in court and was heard upon said motion.

And on consideration of the premises, it appearing to the court that the immediate appointment of a temporary receiver is necessary for the protection of the complainant and all other holders of the second-mortgage bonds of said company and for maintaining the railroads of said company in continued operation, it is now ordered, adjudged, and decreed that Charles P. Clark, of Newton, in the State of Massachusetts, be, and he hereby is, appointed receiver in this cause, with full powers and authority to enter upon and take possession of all and singular the railways of said New York and New England Railroad Company, together with all of its lands, tracks, lines, buildings, wharves, locomotives, cars, franchises, rights, leases and leasehold, estates and rights, charters and property, real and personal, of said company, and the earnings and income thereof and therefrom, including all the moneys, credits, choses in action, evidences of debt, books, deeds, leases, contracts, papers, and vouchers of the said New York and New England Railroad Company, and the same to demand, collect, and receive by suit or otherwise,
22 and with said moneys and other moneys which shall be received by said receiver in his said capacity said receiver shall maintain and keep in repair the said railroad and operate and carry on the same or such part thereof as may be practicable and for the interest of all parties concerned and receive the income therefrom and the earnings thereof.

And to this end the officers, agents, and employees of said New York and New England Railroad Company having the custody, possession, or control of said property or of any part thereof are hereby ordered and required forthwith, upon the request of said receiver, to surrender and deliver the same to said receiver, his agents and employees, and the legal possession and control of all said property shall vest immediately in said receiver.

And said receiver is hereby empowered to retain and employ such legal counsel and attorneys, agents, servants, laborers, clerks, and assistants as he may deem necessary in the performance of his duties as such receiver, and to these ends and for these purposes to appropriate, apply, and use the moneys aforesaid, together with the current earnings of said railroads and the income of all said property, so far as the same shall be necessary, and to enter into contracts for obtaining supplies to operate said railroads and for sustaining, keeping, and putting the same and the equipment thereof in proper repair and condition, and to erect, rebuild, or repair bridges, buildings, or other structures necessary and proper for the advantageous and economical working of said railroads and the transaction of their business.

Said receiver is hereby authorized to settle, adjust, and satisfy all legal and proper claims for damages or injuries to persons or property that may be claimed against him, incurred while such receiver, and is hereby authorized to pay the same from moneys in his hands as such receiver.

Said receiver, acting in good faith under this order without negligence and in the exercise of reasonable and ordinary prudence and

care, shall not be answerable out of his own estate and property for any breach of any contract which shall be entered into by
23 him as such receiver in the execution of the powers herein vested in him or for any injury to the person or property of third persons by accident in the prosecution of the business or by the negligence of others employed by said receiver.

It is further ordered that said receiver shall, without unnecessary delay upon entering upon his duties as such, make an inventory in detail of property which shall come into his hands as such receiver and an apt description or designation of the same; also of all choses in action and evidences of debt due or owing to said company from third persons and of all moneys on hand at the time of so taking possession by him, and file said inventory in this cause in the office of the clerk of the court within ninety days from the date of this order, duly verified under oath by him.

Said receiver shall also keep, in systematic order, full, true, and accurate accounts of all his receipts and disbursements, including all receipts and disbursements made by his employees and agents, and shall every three months during the continuance of this trust, and oftener if required by the court, file in the office of the clerk of this court, duly verified under oath as aforesaid, a statement for the preceding three months for which the accounts are then made up and ready to report, including the aggregate receipts and disbursements during that period by months, including the receipts and disbursements of all employees and agents, and a like statement of all liabilities incurred by him during the time of the trust remaining unpaid and such other accounts and statements as may be necessary to a clear understanding of the condition and administration of the trust in his hands during the period covered by such report, and a distinction shall be made by said receiver in said statements or reports between receipts arising from his prosecution of the business and those from other sources.

It is further ordered that until the further order of the court the said New York and New England Railroad Company, its officers, agents, employees, and servants, be enjoined and strictly re-
24 strained from in any manner interfering with any of the property, books, papers, and vouchers aforesaid, except to deliver and surrender the same into the hands of said receiver:

Provided, however, that said receiver shall not assume to act as such in any manner until he file with the clerk of this court a penal bond, with two sureties satisfactory to said clerk or to one of the judges of the court, in the sum of one hundred thousand (100,000) dollars, payable to said clerk and his successors in office for the use and benefit of any and all persons who are or may be concerned, conditioned for the faithful performance by said Charles P. Clark of his duties as such receiver so long as he may continue in office as such, either under this or any further decree in this cause.

And said receiver is hereby authorized to pay out of any funds coming into his hands all bills for labor and supplies accruing since December 1st, 1883, including salaries, reserving for future consider-

ation whether he shall also pay any accounts accrued prior to that date.

N. SHIPMAN,
District Judge.

Filed Jan. 1. 1884.

25 Circuit Court of the United States within and for the Second Circuit, District of Connecticut.

HENRY A. BRASSEY
vs.
THE NEW YORK AND NEW ENGLAND RAILROAD CO. } In Equity.

Bond.

Know all men by these presents that we, Charles P. Clark, of Newton, in the county of Middlesex and State of Massachusetts, as principal, and Francis Higginson, of Boston, in the county of Suffolk and State of Massachusetts, and Thomas Nickerson, of Newton, in the county of Middlesex and State of Massachusetts, as sureties, are holden and stand firmly bound and obliged unto Edward E. Marvin, of Hartford, in the State of Connecticut, as he is clerk of the circuit court of the United States in and for the district of Connecticut, in the second circuit, in the full and just sum of one hundred thousand (100,000) dollars, to be paid unto the said Edwin E. Marvin, clerk as aforesaid, and his successors in said office or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated the first day of January, in the year of our Lord one thousand eight hundred and eighty-four.

The condition of this obligation is such that whereas in and by a decree of the said circuit court, held at chambers, at Hartford, within and for the district of Connecticut, in the second circuit, on this first day of January, 1884, made in the suit of Henry A. Brassey *versus* The New York and New England Railroad Company and others, pending in the said court, Charles P. Clark, of Newton, in the county of Middlesex and State of Massachusetts, was appointed a receiver of said company and of all and singular the property of the New York and New England Railroad Company, with the powers, authorities, and duties in said decree set forth; and whereas in and by said decree it is ordered that said receiver,

26 before assuming to act as such, gives his bond in the penal sum of one hundred thousand (100,000) dollars to the clerk of said court as obligee and his successors in said office, with two sureties, to the satisfaction of said clerk or one of the judges of said court; said bond to be for the benefit of all persons concerned and to be conditioned for the faithful performance by such receiver of his duties as such:

Now, therefore, if the above-bounden Charles P. Clark shall well and truly perform each and all his duties as such receiver as afore-

said, then this obligation shall be void; otherwise shall remain in full force and effect.

CHARLES P. CLARK. [SEAL.]
FRANCIS L. HIGGINSON. [SEAL.]
THOS. NICKERSON. [SEAL.]

The foregoing bond and Thomas Nickerson and Francis L. Higginson, as sureties therein, are hereoy approved.

Hartford, January 1, 1884.

N. SHIPMAN,
District Judge.

Filed Jan. 1, 1884.
E. E. MARVIN, *Clerk.*

27 Supreme Court.

HARRIET S. RUMSEY, HARRIET M. RUMSEY, JULIA RUMSEY, and LIZZIE RUMSEY
against
THE NEW YORK AND NEW ENGLAND RAILROAD COMPANY.

This action having been brought to trial before me without a jury, at the court-house, in the city of Poughkeepsie, on the 29th day of June, 1889, I find the following facts:

I. That the plaintiffs are the owners, and have been for more than ten years last past, of certain uplands situated in the village of Fishkill Landing, in the county of Dutchess and State of New York, said lands being bounded on the westerly side thereof by the Hudson river and running along said Hudson river about 1,000 feet.

II. That said plaintiffs are the owners of the land under the water of the said Hudson river in front of and adjacent to the upland mentioned in paragraph one in the complaint in this action, being about 1,000 feet on the shore line and along the channel bank of said river, and being about 2,000 feet from said high-water mark to the channel bank of said river, excepting therefrom the rights of the New York Central and Hudson River Railroad Company.

III. That said plaintiffs have been the owners of said land under the water of the said Hudson river since about the 3d day of March, 1885, when a deed of said lands under water was executed and delivered to said plaintiffs by the commissioners of the land office of the State of New York; that application was made by said plaintiffs to the said commissioners of the land office of the State of New York for such land grant in the year 1880.

IV. That the defendant is a railroad corporation, duly in-
28 corporated under and by virtue of the laws of the State of New York, and running and operating said road from the Hudson river at Fishkill easterly to the city of Boston.

V. That said defendant has built its road-bed upon the lands under the water of the Hudson river which are owned by the plaintiffs, which lands are described in paragraph 2 in the complaint in this action, without any right or authority from said plaintiffs.

I find as conclusions of law—

I. That the plaintiffs are the owners of the upland described in the complaint.

II. That the plaintiffs are the owners of the land under water described in the complaint.

III. That said plaintiffs were and are the adjacent owners to the land under water described in the complaint, and that the grant of the lands under water made to them by the commissioners of the land office of the State of New York on the 3d day of March, 1885, was a valid and legal grant of said lands.

IV. That the defendant had no right or authority to build its railroad on said lands under water described in the complaint.

Let judgment be entered accordingly, with costs.

Dated July 13th, 1889.

J. F. BARNARD,
Justice Supreme Court.

No opinion was written.

Supreme Court.

HARRIET S. RUMSEY and Others
against
THE NEW YORK AND NEW ENGLAND RAILROAD COMPANY.

The defendant hereby excepts to the following findings of fact and conclusions of law contained in the decision of Mr. Justice Barnard in this action—that is to say:

1st. The defendant excepts to the finding of fact numbered II.

29 2nd. The defendant excepts to the finding of fact numbered III.

3rd. The defendant excepts to the finding of fact numbered V.

4th. The defendant excepts to the conclusion of law numbered I.

5th. The defendant excepts to the conclusion of law numbered II.

6th. The defendant excepts to the conclusion of law numbered III.

7th. The defendant excepts to the conclusion of law numbered IV.

Dated August 3rd, 1889.

WALTER C. ANTHONY,
Def't's Att'y.

To H. H. Hustis, Esq., pl'ffs' att'y.

Supreme Court.

HARRIET RUMSEY *et al.*
against
THE NEW YORK AND NEW ENGLAND RAILROAD COMPANY.

The defendant requests the court to find as follows, viz:

As Facts.

1st. That the plaintiffs' only right in the premises in question is derived through their water grant, which was made by virtue of chapter 283 of the Laws of 1850. (Found.)

2nd. That chapter 283 of the Laws of 1850 was not passed with the assent of two-thirds of all the members elected to each branch of the legislature. (Refused.)

3rd. That said chapter 283 of the Laws of 1850 was not certified by the presiding officer of the assembly to have been passed in that house with the assent of two-thirds of all the members elected thereto. (Refused.)

30 4th. That defendant's railway was built before the plaintiffs' water grant was made. (Found.)

5th. That the defendant's railway runs into and across several States and the defendant is engaged in inte-state commerce and was when plaintiffs' water grant was made. (Found.)

6th. That the defendant is incorporated in and pursuant to the laws of several States. (Found.)

7th. That the use by the plaintiffs of the lands granted to them west of the Hudson River railroad will prevent vessels passing to and fro between said railroad's lands and tracks and the channel of the river. (Found.)

8th. That when this action was begun and for some time before and after the railroad and all the property of the defendant was in charge of a receiver appointed by the United States circuit court. (Found.)

As Conclusions of Law.

1st. That chap. 283 of the Laws of 1850 appropriates public property to local or private uses. (Refused.)

2nd. That chap. 283 of the Laws of 1850 could not be lawfully and constitutionally passed except with the assent of two-thirds of all the members elected to each house of the legislature. (Refused.)

3rd. That it is and has always been null and void. (Refused.)

4th. That the power to appropriate public property to a local or private use is, under the constitution of this State, a function of the legislature. (Refused.)

5th. That the attempt made by chap. 283 of the Laws of 1850 to delegate to the land commissioners authority to grant, in their discretion, portions of the public property for local and private purposes was and is an unauthorized and unconstitutional delegation of legislative power and discretion. (Refused.)

6th. That said chap. 283 of the Laws of 1850 is, for the reasons stated in the 4th and 5th finding of law, unconstitutional and of no effect. (Refused.)

31 7th. That since the adoption of the U. S. Constitution giving Congress the power to regulate commerce between the States and with foreign nations the State of New York holds the title to lands under the navigable waters of the State, where such waters are adapted to interstate or foreign commerce, in trust for the purposes of commerce and for the benefit of all the people of the United States. (Refused.)

8th. That said State therefore cannot lawfully and properly appropriate or use said lands except for the promotion of commerce and the use and benefit of the public. (Refused.)

9th. That chap. 283 of the Laws of New York for 1850 is repugnant to the rights of the United States Government under said section of the Constitution. (Refused.)

10th. That said chapter authorizes the appropriation for private benefit and enjoyment of lands so held by the State in trust. (Refused.)

11th. That it is in conflict with the acts of Congress making railroads and certain rivers post roads, and also with that giving telegraph companies the right to use post roads and lands beneath navigable waters. (Refused.)

12th. That under the general railroad act the defendant had a right to build its road between the termini named in its articles; that the point in dispute is between such termini, and the defendant had the right to build its road at that point. (Refused.)

13th. That the Hudson River R. R. Co. has a right to the unobstructed use of the river between its lands under water and the channel of the river. (Refused.)

14th. The plaintiffs' water grant conveys rights which, if exercised, would interfere with said rights of the Hudson River R. R. Co. (Refused.)

15th. That said water grant is therefore void. (Refused.)

16th. That when this action was begun the defendant was not the proper party to sue, but the action should have been brought against the receiver who was in charge of and operating defendant's road. (Refused.)

32 17th. That this action could not be maintained against the defendant during the continuance of such receivership. (Refused.)

W. C. ANTHONY,
Def't's Att'y.

Supreme Court.

HARRIET S. RUMSEY and Others
against
THE NEW YORK AND NEW ENGLAND RAILROAD COMPANY.

The defendant hereby excepts to the refusal of the court to find facts and conclusions of law as requested by the defendant—that is to say:

1st. The defendant excepts to the refusal to find the 2nd fact as so requested.

2nd. The defendant excepts to the refusal to find the 3rd fact as so requested.

3rd. The defendant excepts to the refusal to find the 1st conclusion of law as so requested.

4th. The defendant excepts to the refusal to find the 2nd conclusion of law as so requested.

5th. The defendant excepts to the refusal to find the 3rd conclusion of law as so requested.

6th. The defendant excepts to the refusal to find the 4th conclusion of law as so requested.

7th. The defendant excepts to the refusal to find the 5th conclusion of law as so requested.

8th. The defendant excepts to the refusal to find the 6th conclusion of law as so requested.

9th. The defendant excepts to the refusal to find the 7th conclusion of law as so requested.

10th. The defendant excepts to the refusal to find the 8th conclusion of law as so requested.

11th. The defendant excepts to the refusal to find the 9th conclusion of law as so requested.

33 12th. The defendant excepts to the refusal to find the 10th conclusion of law as so requested.

13th. The defendant excepts to the refusal to find the 11th conclusion of law as so requested.

14th. The defendant excepts to the refusal to find the 12th conclusion of law as so requested.

15th. The defendant excepts to the refusal to find the 13th conclusion of law as so requested.

16th. The defendant excepts to the refusal to find the 14th conclusion of law as so requested.

17th. The defendant excepts to the refusal to find the 15th conclusion of law as so requested.

18th. The defendant excepts to the refusal to find the 16th conclusion of law as so requested.

19th. The defendant excepts to the refusal to find the 17th conclusion of law as so requested.

Dated August 3rd, 1889.

Yours, &c.,

W. C. ANTHONY,
Def't's Att'y.

To H. H. Hustis, Esq., pl'ffs' att'y.

Supreme Court.

HARRIET S. RUMSEY and Others
against
THE NEW YORK AND NEW ENGLAND RAILROAD COMPANY.

The plaintiffs in this action except to the proposed finding of facts as follows:

1st. The plaintiffs except to the 1st proposed finding of fact.

2nd. The plaintiffs except to the 7th proposed finding of fact.

3rd. The plaintiffs except to the 8th proposed finding of fact.

Dated July 23rd, 1889.

H. H. HUSTIS,
Pl'ffs' Att'y.

Office and post-office address, Fishkill Landing, N. Y.

34 At a special term of the supreme court held at the court-house, in the city of Poughkeepsie, on the 19th day of July, 1889.

Present: Hon. J. F. Barnard, justice.

Supreme Court.

HARRIET S. RUMSEY, HARRIET M. RUMSEY, JULIA RUMSEY, and LIZZIE RUMSEY
against
THE NEW YORK AND NEW ENGLAND RAILROAD COMPANY.

This action having been brought on for trial at the court-house, in the city of Poughkeepsie, before Mr. Justice J. F. Barnard, without a jury—H. H. Hustis appearing as the attorney for the plaintiffs and Walter C. Anthony appearing as the attorney for the defendant—

It is adjudged and decreed that the plaintiffs are the owners of the upland described in the complaint in this action.

It is further adjudged and decreed that said plaintiffs are the owners of the land under the water of the Hudson river described in the complaint in this action.

It is further adjudged and decreed that the plaintiffs were and are the adjacent owners to the land under water described in the complaint, and that the grant of the lands under the water of the Hudson river granted and conveyed to them by the commissioners of the land office of the State of New York on the 3rd day of March, 1885, was a valid and legal grant of said lands.

It is further adjudged and decreed that said defendant had no right or authority to build its railroad on said lands under the water of the Hudson river belonging to said plaintiffs, and said defendant is hereby ordered and decreed forthwith to remove its road from said plaintiffs' lands.

And it is further adjudged and decreed that said plaintiffs
35 recover from the defendant the sum of four hundred and forty-three and $\frac{12}{100}$ dollars for their costs and disbursements in this action, and that they have execution for the same.

Enter.

J. F. BARNARD.

Supreme Court.

HARRIET S. RUMSEY and Others
against
THE NEW YORK AND NEW ENGLAND RAILROAD COMPANY.

Take notice that the above-named defendant, The New York and New England Railroad Company, hereby appeals to the general term of the supreme court from the judgment entered in this action in the office of the county clerk of Dutchess county on the 19th day of July, 1889, in favor of the plaintiffs and against said defendant, and from every part thereof.

Dated August 3rd, 1889.

Yours, &c.,

W. C. ANTHONY,
Att'y for the Def'd't, Appellant.

To H. H. Hustis, Esq., pl'ffs' att'y, and the county clerk of Dutchess county, N. Y.

The foregoing case on appeal is hereby approved and ordered on file.

Dated August, 1889.

J. F. BARNARD,
Justice Supreme Court.

36 At a general term of the supreme court held at the court-house, in Brooklyn, on the 9th day of December, 1889.

Present: Hon. C. E. Pratt, Hon. J. O. Dykman, justices.

Supreme Court.

HARRIET S. RUMSEY, HARRIET M. RUMSEY, JULIA RUMSEY, and ELIZABETH RUMSEY, Resp'd'ts,
against
THE NEW YORK AND NEW ENGLAND RAILROAD COMPANY, App'l't.

The appeal from the judgment in this action coming on to be heard at the general term of this court, held in the city of Brooklyn, and counsel having been heard and due deliberation had thereon, it is now hereby—

Ordered that said judgment appealed from be, and the same hereby is, in all things affirmed, with costs and disbursements to the respondents.

Enter.

J. F. BARNARD, *P. J.*

Supreme Court.

HARRIET S. RUMSEY, HARRIET M. RUMSEY, JULIA RUMSEY, and ELIZABETH RUMSEY
against
THE NEW YORK AND NEW ENGLAND RAILROAD COMPANY.

Judgment, Dec. 17, 1889.

The appeal from the judgment in this action, entered in the Dutchess county clerk's office on the 19th day of July, 1889, having been brought on for argument before the general term of the
37 supreme court, in the second department, and the decision of said court in writing having been filed in favor of the plaintiffs, with costs:

Now, on motion of H. H. Hustis, the plaintiffs' attorney, it is ordered and adjudged that said judgment be, and the same is hereby, in all things affirmed, and that the plaintiffs recover of the defendants the sum of $78.21 for their costs and disbursements on said appeal.

THEO. A. HOFFMAN, *Clerk.*

Supreme Court.

HARRIET S. RUMSEY and Others
against
THE NEW YORK AND NEW ENGLAND RAILROAD COMPANY.

Take notice that the defendant hereby appeals to the court of ap-

peals from the order of the general term of the supreme court in the above-entitled action, granted the 9th day of December, 1889, affirming the judgment of the special term in said action, and also from the judgment of said general term, entered in the clerk's office of Dutchess county, New York, the 17th day of December, 1889, affirming said judgment of the special term and adjudging that the plaintiffs recover of the defendant seventy-eight $\frac{21}{100}$ dollars, costs and disbursements, and from every part of said order and judgment.

Dated January 15th, 1890.

WALTER C. ANTHONY,
Att'y for N. Y. & N. E. R. R. Co., Appellant.

To H. H. Hustis, Esq., pl'ffs' att'y, and to the clerk of Dutchess Co., N. Y.

38 STATE OF NEW YORK, } ss:
Dutchess County, Clerk's Office, }

I, Theodore A. Hoffman, the clerk of the county of Dutchess, in the State of New York, do hereby certify that I have compared the preceding copies of the notice of appeal, and of the order and judgment appealed from, and of the judgment-roll, also hereto prefixed, with the several originals remaining on file in my office, and that the same are true and correct transcripts therefrom and of the whole of such originals.

[L. S.] In testimony whereof I have hereunto set my hand and affixed my official seal this 25th day of January, 1890.

THEODORE A. HOFFMAN,
Clerk of Dutchess Co.

STATE OF NEW YORK, } ss:
County of Orange, }

Walter C. Anthony, being duly sworn, says that, as he is informed and believes, no opinion was written by the general term of the supreme court in connection with its decision of the case of Harriet S. Rumsey and others, respondents, against The New York and New England Railroad Company, appellant, and consequently deponent has been unable to procure any opinion in said case.

WALTER C. ANTHONY.

Sworn before me January 21st, 1890.

WILLARD M. TERPENING,
Notary Public, Orange County.

(Here follow diagrams marked pp. 39 & 40.)

41 Court of Appeals.

STATE OF NEW YORK, ss:

Pleas in the court of appeals held at the capitol, in the city of Albany, on the 27th day of October, in the year of our Lord one

thousand eight hundred and ninety-one, before the judges of said court.

Witness the Hon. William C. Ruger, chief judge, presiding.

GORHAM PARKS, *Clerk.*

Remittitur, Oct. 27th, 1891.

HARRIET S. RUMSEY and Others, Resp'd'ts,
ag'st
THE NEW YORK AND NEW ENGLAND RAILROAD COMPANY, Appellant.

Be it remembered that on the eleventh day of February, in the year of our Lord one thousand eight hundred and ninety, The New York and New England Railroad Company, the appellant in this action, came here into the court of appeals, by Walter C.
42 Anthony, its attorney, and filed in the said court a notice of appeal and return thereto from the judgment of the general term of the supreme court of the State of New York, and Harriet S. Rumsey and others, the respondents in said action, afterwards appeared in said court of appeals, by H. H. Hustis, their attorney; which said notice of appeal and the return thereto, filed as aforesaid, are hereto annexed.

Whereupon the said court of appeals, having heard this cause argued by Mr. W. C. Anthony, of counsel for the appellant, and by Mr. H. H. Hustis, of counsel for the respondents, and, after due deliberation had thereon, did order and adjudge that the judgment of the supreme court appealed from in this action be in all things affirmed; and it was further ordered and adjudged that the respondents recover against the appellant costs of appeal to this court; and it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the said supreme court, there to be proceeded upon according to law. Wherefore it is considered that the said judgment be in all things affirmed,
43 with costs as aforesaid, and stand in full force, strength, and effect; and hereupon as well as the notice of appeal and return thereto as aforesaid as the judgment of the court of appeals aforesaid by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York, before the justice thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in said supreme court before the justice thereof, &c.

GORHAM PARKS,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, *Oct. 27th,* 1891.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[Seal Court of Appeals.]

GORHAM PARKS, *Clerk.*

44 At a special term of the supreme court held at the court-house, in the city of Poughkeepsie, on the 2nd day of November, 1891.

Present: Hon. J. F. Barnard, justice supreme court.

HARRIET S. RUMSEY, HARRIET M. RUMSEY, JULIA RUMSEY, and LIZZIE RUMSEY
ag'st
THE NEW YORK & NEW ENGLAND RAILROAD COMPANY.

The defendant having appealed to the court of appeals of the State of New York from the judgment of the general term of the 2nd department entered in this action, in the Dutchess county clerk's office, on the 17th day of December, 1889, in favor of the plaintiffs and against the defendant, affirming the judgment at special term, dated July 19th, 1889, and the court of appeals, having heard the appeal argued by counsel for the respective parties and after due deliberation had thereon, having, on the 27th day of October, 1891, ordered and adjudged that the judgment of said general term and the
45 judgment of said special term be in all things affirmed, with costs, as appears by the remittitur from said court of appeals, dated *October* 27th day of October, 1891:

Now, on reading and filing said remittitur from the court of appeals and on motion of H. H. Hustis, the attorney for the plaintiffs, it is ordered that said order of the court of appeals be, and the same is hereby, made the order of this court.

And it is further ordered and adjudged that said plaintiffs recover of the defendant the sum of $99.60 for their costs and disbursements in the court of appeals.

Enter.

J. F. BARNARD,
Justice Supreme Court.

Filed Nov. 2, 1891, at 10.38 a. m.

46 In the United States Supreme Court.

HARRIET S. RUMSEY, HARRIET M. RUMSEY, JULIA RUMSEY, & LIZZIE RUMSEY
against
THE NEW YORK AND NEW ENGLAND RAILROAD COMPANY.

To the honorable the Supreme Court of the United States:

Your petitioner, The New York & New England Railroad Company, respectfully shows to the court that it is a railroad corporation duly incorporated under the laws of the several States into which and through which it runs, including the State of New York.

Your petitioner further states that an action was brought by the above-named Harriet S. Rumsey, Harriet M. Rumsey, Julia Rumsey, and Lizzie Rumsey, in the supreme court of the State of New York, against your petitioner, to enjoin and prohibit it from running and operating its railroad upon lands under the water of the

Hudson river; which said lands the above-named Rumseys alleged belonged to and were owned by them by virtue of a grant thereof made to them by the commissioners of the land office of the State of New York on the 3rd day of March, 1885, all of which will more fully appear by reference to a certified copy of the record in said action.

47 That said action terminated in favor of the said Rumseys, and was carried by your petitioner to the court of appeals of the State of New York, which court affirmed the judgment of and remitted said cause to said supreme court, and said last-named court thereupon, on the 27th day of October, 1891, by order made such affirmance the judgment of the said supreme court.

Your petitioner further states that by its amended answer in this action it drew into question the validity of the grant of the lands made to the above-named Rumseys, as hereinbefore stated, and the statute under which it was granted, to wit, chapter 283 of the Laws of New York for the Year 1850, on the ground of its being repugnant to article 1, section 8, subdivision 3, of the Constitution of the United States, and to section 3964 and 5263 of the United States Revised Statutes, and that the decision is in favor of the validity of said act and of said grant.

Your petitioner further states that the grounds upon which it contended for the invalidity and unconstitutionality of the said statute, to wit, chapter 283 of the Laws of 1850, before the supreme court of the State of New York and the court of appeals of said State, are stated and set forth in the requests to find presented by your petitioner's attorney to the said supreme court of the State of New York, which will be found between folios 116 and 126, inclusive, of the certified copy of the record of this action herewith presented.

48 Your petitioner further states that the judgment in this action in favor of the validity of the said statute is final, and was rendered by the highest court in the State of New York.

Wherefore your petitioner prays your honors that this cause be removed to the Supreme Court of the United States by writ of error directed to the supreme court of the State of New York, and for a reversal of judgment rendered in the above-entitled action against the petitioner herein and in favor of the said Harriet S. Rumsey, Harriet M. Rumsey, Julia Rumsey, and Lizzie Rumsey above named, and that your honors issue a citation commanding the said Harriet S. Rumsey, Harriet M. Rumsey, Julia Rumsey, and Lizzie Rumsey to appear and answer the said writ of error in the said Supreme Court on the — day of ——, 1891, and that your honors fix the amount of and approve a supersedeas bond to be given by your petitioner for the prosecution of said writ of error.

Dated 2nd day of Dec'r, 1891.

THE NEW YORK & NEW ENGLAND RAILROAD COMPANY,
By WALTER C. ANTHONY, *Its Attorney.*

49 In the U. S. Supreme Court.

HARRIET S. RUMSEY, HARRIET M. RUMSEY, JULIA RUMSEY, and LIZZIE RUMSEY
against
THE NEW YORK AND NEW ENGLAND RAILROAD COMPANY.

Know all men by these presents that the New York & New England Railroad Company, as principal, and Jabez A. Bostwick, residing at 800 Fifth avenue, in the city of New York, in the county and State of New York, and William H. Starbuck, residing at # 8 East 64th street, in the city of New York, in said county and State of New York, are held and firmly bound unto Harriet S. Rumsey, Harriet M. Rumsey, Julia Rumsey, and Lizzie Rumsey above named in the sum of two thousand five hundred dollars; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

In witness whereof the said The New York and New England Railroad Company has caused its corporate seal to be here-
50 unto affixed and these presents to be subscribed by its vice-president, and the said Jabez A. Bostwick and William H. Starbuck have hereunto set their hands and seals this third day of December, 1891.

Whereas lately, at a stated term of the court of appeals of the State of New York, in a suit pending in said court between the said Harriet S. Rumsey, Harriet M. Rumsey, Julia Rumsey, and Lizzie Rumsey and The New York and New England Railroad Company, judgment rendered against the said The New York and New England Railroad Company in the supreme court of the State of New York was affirmed by said court of appeals, and the said The New York & New England Railroad Company having obtained a writ of error and filed a copy thereof in the office of the clerk of the said Supreme Court of the United States to reverse the judgment of the aforesaid suit, and a citation directed to the said Harriet S. Rumsey, Harriet M. Rumsey, Julia Rumsey, and Lizzie Rumsey, citing and admonishing them to be and appear at a Supreme Court of the United States to be held at Washington within thirty days from the 9th day of December, 1891:

51 Now, the condition of the above obligation is such that if the said The New York and New England Railroad Company shall prosecute this said writ of error to effect and answer all damages and costs that may be awarded against it and sustained by the said Harriet S. Rumsey, Harriet M. Rumsey, Julia Rumsey, and Lizzie Rumsey if it shall fail to make this plea good, then the above obligation to be void; else to remain in full force and virtue.

THE N. Y. & N. E. R. R. CO.,
By CHARLES HOWARD, *Vice-President.*
[CORP. SEAL.] J. A. BOSTWICK. [L. S.]
WILLIAM H. STARBUCK. [L. S.]

Signed, sealed, & del'd in presence of—
EDWARD L. OWEN.

STATE OF NEW YORK,
City & Co. of New York, Southern District of New York.

Jabez A. Bostwick, being duly sworn, deposes and states that he is a resident of & a freeholder within the State of New York & is worth double the sum specified in the above bond or undertaking over all the debts and liabilities which he owes or has incurred & exclusive of property exempt by law from lien or sale under an execution.

J. A. BOSTWICK. [L. S.]

Sworn to before me this 4th day of December, 1891.
[SEAL.] EDWARD L. OWEN,
U. S. Commissioner of the Southern District of New York.

52 STATE OF NEW YORK,
City & Co. of New York, Southern District of New York.

William H. Starbuck, being duly sworn, deposes and states that he is a resident of and a freeholder within the State of New York and is worth double the sum specified in the above bond or undertaking over all the debts and liabilities which he owes or has incurred and exclusive of property exempt by law from lien or sale under execution.

WILLIAM H. STARBUCK. [L. S.]

Sworn to before me this 4th day of December, 1891.
[SEAL.] EDWARD L. OWEN,
U. S. Commissioner for the Southern Dis'ct of N. Y.

STATE OF NEW YORK,
City & Co. of N. Y., Southern Distr't of N. Y.

I certify that on this 4th day of December, 1891, before me personally appeared the above-named Jabez A. Bostwick and William H. Starbuck, to me known & known to me to be the individuals described in & who executed the above undertaking, & severally acknowledged that they executed the same.

EDWARD L. OWEN,
U. S. Com's'r of the Southern District of N. Y.

53 STATE OF NEW YORK,
City & Co. of New York, Southern District of New York.

Charles Howard, being duly sworn, says that he is the vice-president of the New York and New England Railroad Company and knows the corporate seal of said company; that the seal attached to the within bond is such corporate seal; that it was so attached in pursuance of the order and direction and by virtue of a resolution of the executive committee of the board of directors of said company, and that deponent, as the vice-president of said company, signed said bond in the name & behalf of said company by virtue and in pursuance of a like resolution of the executive committee of the board of directors of said company.

CHARLES HOWARD.

Sworn to & subscribed before me this 4th day of December, 1891.

[SEAL.] EDWARD L. OWEN,
U. S. Com's'r for the Southern District of New York.

Bond for the supersedeas of the within cause having been fixed by the court at the sum of $2,500, I hereby approve & order the within bond for such sum to be filed.

SAMUEL BLATCHFORD,
Associate Justice Supreme Court of the U. S.

54 In the Supreme Court of the United States.

HARRIET S. RUMSEY, HARRIET M. RUMSEY, JULIA RUMSEY, and LIZZIE RUMSEY
against
THE NEW YORK AND NEW ENGLAND RAILROAD COMPANY.

UNITED STATES OF AMERICA:

The President of the United States to the honorable the supreme court of the State of New York, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of New York, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had after a decision by the court of appeals of said State in the said suit between Harriet S. Rumsey, Harriet M. Rumsey, Julia Rumsey, and Lizzie Rumsey and The New York and New England Railroad Company, above named, wherein was drawn into question the validity of an authority exercised under said State on the ground of its being repugnant to the Constitution of the United States and the decision was in favor of such its validity, a manifest error hath happened, to the great damage of the said The New York and New England Railroad Company, as by defendant's
55 petition appears, we, being willing that that error, if any hath been, should be duly corrected and fully and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days of the date hereof, in the Supreme Court to be then and there held, that, the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, on the ninth day of December, in the year 1891,

and the seal of the said Supreme Court, at Washington, in the 115th year of the Independence of the United States.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Writ of error allowed by—
SAM'L BLATCHFORD,
Associate Justice of the Supreme Court of the United States.

56 UNITED STATES OF AMERICA.

STATE OF NEW YORK, } *ss:*
County of Orange, }

Willard M. Terpening, being duly sworn, says that he personally served the foregoing bond and writ of error on Henry H. Hustis, the attorney for Harriet S. Rumsey and others, the defendants in error, at the town of Fishkill, in the county of Dutchess and State of New York; that such service was made by delivering to and leaving with him a true copy of said bond and of said writ of error; that such copy of said bond was so delivered on December 14th, 1891, and such copy of said writ was so delivered on December 22nd, 1891, and that the original of said bond is filed in the office of the clerk of Dutchess county, N. Y.

WILLARD M. TERPENING.

Sworn — before me December 22nd, 1891.

R. KETCHAM,
Notary Public in & for Orange Co., N. Y.

57 In the Supreme Court of the United States.

HARRIET S. RUMSEY, HARRIET M. RUMSEY, JULIA RUMSEY, and LIZZIE RUMSEY
against
THE NEW YORK AND NEW ENGLAND RAILROAD COMPANY. } Citation.

The United States of America to the above-named plaintiffs, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the county of Dutchess, in the city of Poughkeepsie (the clerk of the supreme court of the State of New York held in and for the said county of Dutchess), wherein The New York and New England Railroad Company, above named, is plaintiff in error and you are defendants in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 9th day of December, 1891.

SAM'L BLATCHFORD,
Associate Justice of the Supreme Court of the United States.

58 STATE OF NEW YORK, } ss:
City of Newburgh, County of Orange, }

SOUTHERN DISTRICT OF NEW YORK, *ss:*

On this 14th day of December, 1891, personally appeared before me the subscriber and makes oath that he delivered a true copy of the within citation to Henry H. Hustis, the attorney of record for Harriet S. Rumsey, Harriet M. Rumsey, Julia Rumsey, and Lizzie Rumsey in the within-entitled action in the supreme court of New York, at the town of Fishkill, Dutchess county, New York, on the 14th day of December, 1891; and at the same time and place deponent showed to said Hustis the annexed original citation and the signature of Mr. Justice Blatchford thereto.

WILLARD M. TERPENING.

Sworn to and subscribed before me December 14, 1891.

{ Seal E. A. Brewster, Jr., Commissioner U. S. Circuit Court, Southern District of New York, Newburgh, N. Y. }

E. A. BREWSTER, JR.,
U. S. Commissioner, Southern District of New York.

59 The People of the State of New York, by the grace of God free and independant, to all — whom these presents shall come or may concern, Greeting:

Know ye that we, having inspected the records and proceedings remaining in the offices of the clerk and reporter of the court of appeals for the State of New York, in the city of Albany, *and* find on file in the office of the reporter of this court a certain opinion rendered by the court of appeals (second division) of the State of New York in the case of Harriet S. Rumsey & others, respondents, *vs.* The New York and New England Railroad Company, appellant, in the words and figures following, to wit:

60 Court of Appeals, Second Division.

OCT. 27TH, 1891.

HARRIET S. RUMSEY *et al.*, Respondents,
vs.
THE NEW YORK AND NEW ENGLAND RAILROAD COMPANY, Appellant.

Appeal from a judgment of the general term, second department, affirming a judgment entered upon a decision made at the Dutchess special term.

W. C. Anthony, for appellant; H. H. Hustis, for respondents.

HAIGHT, *J.:*

This action was brought to restrain the defendant from operating its railroad upon lands claimed to belong to the plaintiffs.

The defendant's road at the village of Fishkill Landing was con-

structed in the year 1881 in the Hudson river upon lands under water in front of uplands owned by the plaintiffs. On the 3d day of March, 1885, the governor of the State, pursuant to a resolution of the commissioners of the land office, issued to the plaintiffs a patent of the lands under water in the Hudson river in front of their uplands, being about one thousand feet on the shore line and along the bank of the river and about two thousand feet from high-water mark to the channel bank of the river, excepting therefrom the rights of
61 the New York Central and Hudson River Railroad Company.

It is contended that the plaintiffs obtained no valid title to the lands under water by reason of this patent, for the reason that it was issued under and pursuant to chapter 283 of the Laws of 1850, which act provides for the appropriation of public property to a private use, and because it is not certified to have passed the assembly by a two-thirds vote.

The act provides that "the commissioners of the land office shall have power to grant in perpetuity or otherwise so much of the lands under the waters of navigable rivers or lakes as they shall deem necessary to promote the commerce of this State or proper for the purpose of beneficial enjoyment of the same by the adjacent owner, but no such grant shall be made to any person other than the proprietor of the adjacent lands, and any such grant that shall be made to any other person shall be void."

No question is made but that the certificate of the presiding officer of the senate is in due form. That of the assembly is as follows:

"STATE OF NEW YORK:

IN ASSEMBLY, *April* 10, 1850.

This bill was read the third time and passed, two-thirds of all the members elected to the assembly being present on its final passage.

By order of the assembly:

F. C. DININNY,
Speaker pro tem."

62 The statute provides that the assent of two-thirds of the members elected to each branch of the legislature is requisite to every bill appropriating the public moneys or property for local or private purposes, and no bill shall be deemed to have passed by the assent of two-thirds of the members elected to each house unless so certified by the presiding officer of each house. 1 R. S., 7th ed., 432, secs. 2, 3.

The act in question is doubtless one which required the assent of two-thirds of the members elected to each branch of the legislature, and the certificate of the presiding officer of the assembly is defective in not showing whether it received the assent of a majority or two-thirds of the members elected.

The act as published in the Session Laws states that it was by a two-thirds vote. This statement is made in accordance with the provisions of chapter 306 of the Laws of 1842, which makes the

same presumptive evidence that the bill was certified by the presiding officers as having been passed by the assent of two-thirds of the members elected to each house. This presumption, however, may doubtless be overcome by the production of the original certificate. The certificate produced, however, does not state that it was not passed by a two-thirds vote. It merely states that it was passed; that the two-thirds of the members elected to the assembly were present. The certificate, therefore, independent of the statute
63 refereed to, would not overcome the presumption created by the statement appearing in the Session Laws. Under the statute the act shall not be deemed to have been passed by the assent of two-thirds unless the presiding officer so certifies; but this statute evidently contemplates that the certificate be made in due form, free from defects and clerical errors. Such a certificate would doubtless be conclusive; but to hold that a defective certificate, one that fails to state the fact either way, is under the statute conclusive and overcomes the presumption created by the statement appearing in the Session Laws is giving the statute an interpretation which we think was never intended. May we, under these circumstances, look at the journal of the assembly for the purpose of determining the fact?

In the case of The People *vs.* Purdy, 2 Hill, 31–34, Bronson, J., in delivering the opinion of the court, said: "It has not been denied that the judicial tribunals of the State may in some way look behind the printed statute book for the purpose of ascertaining whether bills coming within the two-thirds clause of the constitution have received the requisite number of votes, and although I have felt a good deal of difficulty on that question I am inclined to the opinion that such an inquiry may be instituted. The question is no doubt one of great delicacy, but if the courts have the right to entertain it the duty is imperative and we are not at liberty to shrink from its performance."

These views were approved by the court of errors on the review of the case. 4 Hill, 384.

64 And to the same effect is the case of Purdy *vs.* The Commissioner of Highways of the Town of Marlborough, 54 N. Y., 276.

It is quite possible, however, that the courts would not be justified in going back of the original act on file in the secretary of state's office and the certificates thereto attached for the purpose of impeaching them. The People *vs.* Devlin, 33 N. Y., 269.

But in this case, as we have seen, the certificate of the presiding officer of the assembly is not in due form. It shows that the bill was passed, but not whether it was passed by a majority or a two-thirds vote. The omission to state that fact was evidently a clerical error, and under these circumstances we are inclined to the opinion that we may look back to the journal for the purpose of ascertaining the fact.

Upon an inspection of the Journal of the Assembly for 1850, volume I, page 1268, it appears that the act in question was passed unanimously by the assembly, 101 votes in the affirmative and

none against it, more than two-thirds of all the members voting therefor.

It is claimed that the act of 1850 contravenes the constitution, because it tends to delegate the powers and functions of the legislature. As we have seen, the act gives to the commissioners of the land office the power to grant lands under the waters of navigable rivers or lakes to promote the commerce of the State or for the purpose of beneficial enjoyment by the adjacent owner.

The constitution provides that the lieutenant governor,
65 speaker of the assembly, secretary of state, comptroller, treasurer, attorney general, and State engineer and surveyor shall be the commissioners of the land office, and that their powers and duties "shall be such as now are or hereafter may be prescribed by law." Constitution, article V, sections 5, 6.

This appears to give to the legislature in express terms the authority to prescribe the powers and duties of the commissioners of the land office, which has been done by the act in question.

It is also claimed that the State holds a qualified title to the lands under the waters of navigable rivers open to the sea, and that it has no right to appropriate them to a private use inconsistent with that of the people of the United States for the purpose of commerce and navigation. Suppose this to be so. The United States, however, is not here complaining of any encroachment upon the rights of interstate commerce, and there is no pretense that the grant in question operates to interfere with the navigation of the river. Under the findings of the trial court the grant only extends to the channel bank of the river, and it could not, therefore, well interfere with the navigation thereof, even though the land granted should be covered with buildings. We do not understand that the United States has ever made any claim to the low, flat lands covered with shallow water outside of the deep channel of navigable rivers, or that it has interfered with the right of the State to control and dispose of the
same. Wilson *vs.* The Black Bird Creek Marsh Company, 2
66 Peters, 245; Kerr *vs.* The West Shore Railroad Company, 37 N. Y. St. Rep., 913–916.

Chapter 140 of the Laws of 1850, which gave to railroad corporations the right to construct their roads across, along, or upon any stream of water, water-course, street, highway, plank road, turnpike, or canal, excepts from the provisions of the act the right to obstruct any navigable stream or lake.

Chapter 565 of the Laws of 1890 removing such exception was passed since the patent was issued by the State to the plaintiffs herein, and that act consequently could not divest the plaintiffs of any previously acquired rights to the lands in question.

This case has already been considered in this court upon a former appeal (114 N. Y., 423), in which the questions not herein considered were disposed of. See also same parties, 125 N. Y., 681; 34 N. Y. St. Rep., 454.

The judgment should be affirmed with costs.

"All concur."

A copy.

H. E. SICKELS, *Reporter*,
Per C.

[Endorsed:] Rumsey *v.* N. Y. & N. E. R. R. Co. Opinion. Haight, J. 1.90, p'd.

67 All which we have caused by these presents to be exemplified and the seal of the court of appeals to be hereunto affixed.

Witness William C. Ruger, Esquire, chief judge of said court of appeals, at the capitol, in the city of Albany, the seventh day of December, in the year of our Lord one thousand eight hundred and ninety-one.

Seal State of New York Court of Appeals.

GORHAM PARKS, *Clerk.*

To all persons to whom these presents shall come or may concern:

I, William C. Ruger, chief judge of the court of appeals of the State of New York, do certify that the foregoing attestation of Gorham Parks, the clerk, and the seal of the said court thereto annexed, is in due form.

Given under my hand, at the city of Albany, in said State, the seventh day of December, in the year of our Lord one thousand eight hundred and ninety-one.

WM. C. RUGER.

68 UNITED STATES OF AMERICA.

STATE OF NEW YORK, *County of Dutchess,* } *ss:*

To the justices of the Supreme Court of the United States, Greeting:

In pursuance and by virtue of the writ of error issued out of your honorable court and herewith returned I, John J. Mylod, the deputy clerk of said county of Dutchess, and as such by law the clerk of the supreme court of the State of New York in and for the county of Dutchess, in the second judicial department of said State, with whom — the records and proceedings and also the final judgment or decree of that certain plea in the aforesaid writ of error mentioned and described which was in the court of appeals of said State, and which was, upon the rendition by said court of appeals of such final judgment or decree, required to be filed and entered and was and is filed and entered and remains of record in my said office, do hereby make return to said writ and herewith transmit a true copy of said record and of the assignments of error and of all pro-

69 ceedings in the case under my hand and the seal of said court, and do hereby certify that the within and foregoing pages, numbered from 1 to 45, inclusive, contain a true and complete transcript of the record and proceedings and also the final judgment and decree had in said court of appeals, which was and is the highest court in said State of New York in which a decision could be had in the said suit, and also in the said supreme court of the State of New York in the said case of Harriet S. Rumsey and others, defendants in error, against The New York and New England Railroad Company, plaintiff in error, as the same were had and rendered in said court

of appeals and were by the said court duly remitted into the said supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be there enforced according to law, and which record and proceeding now remain in the said supreme court of the State of New York, before the justices thereof, as the same now remain of record and on file in my said office.

In testimony whereof I have hereunto caused the seal of said supreme court of the State of New York to be hereunto affixed,
70 at the city of Poughkeepsie, in said county of Dutchess, in the southern district of New York, in the second circuit of the United States, this 22d day of December, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the United States the one hundred and fifteenth.

[Seal Dutchess County.]

JOHN J. MYLOD,
Deputy Clerk.

Endorsed on cover: Case No. 14,963. New York supreme court. Term No., 1479. The New York and New England Railroad Company, plaintiff in error, *vs.* Harriet S. Rumsey, Harriet M. Rumsey, Julia Rumsey, and Lizzie Rumsey. Filed December 30, 1891.

IN THE SUPREME COURT OF THE UNITED STATES.

IN ERROR.

THE NEW YORK AND NEW ENGLAND RAILROAD COMPANY, Plaintiff in Error,
against
HARRIET S. RUMSEY and Others, Defendants in Error.

Afterwards, to wit, on the first day of the October term of said Supreme Court of the United States, before the justices thereof, at the Capitol, in the city of Washington, comes the said The New York and New England Railroad Company, the plaintiff in error, by Walter C. Anthony, its attorney, and says that in the record and proceedings aforesaid and also in the judgment therein set forth there is manifest error, in this, to wit, that in the record aforesaid it appears that the judgment aforesaid was given in favor of said defendants in error against the said plaintiff in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiff in error against the said defendants in error; and also in this, to wit, that the said plaintiff in error claimed that it was entitled in the court of appeals of the State of New York to a reversal of the judgment of the supreme court of the State of New York, which affirmed, on appeal, the judgment of the trial court in favor of the defendants in error herein and against the plaintiff in error herein on the grounds:

(1.) The court below erred in deciding that chapter 283 of the Laws of New York for the year 1850 and the authority attempted to be exercised thereunder by the commissioners of the land office of said State of New York were not repugnant to the Constitution of the United States and were valid, the validity of said statute and said authority having been drawn in question in said suit on the ground of their being repugnant to the Constitution of the United States in this respect, to wit:

That said statute provides or attempts to provide that said commissioners of the land office may, by gift or otherwise, in their discretion, dispose of the lands under the waters of navigable streams open to commerce between the States and with foreign countries, and to so dispose of such lands (by gift or otherwise) for the separate, exclusive, and individual use and benefit of a private person without any regard to the public interests or convenience or to the use of said lands or of the waters covering them for the purposes of commerce.

(2.) The court below erred in deciding and holding that the grant or conveyance made by the commissioners of the land office to the defendants in error under and by virtue of said chapter 283 of the Laws of New York for the year 1850 was not repugnant to the Constitution of the United States and was valid, the validity of said grant having been drawn in question in said suit on the ground

that it was repugnant to the Constitution of the United States in this respect, to wit:

That it purported and attempted to convey, as a gift, to private individuals, for their exclusive use and benefit, certain lands underneath the waters of the Hudson river at a point where said river was actually and by nature adapted to use for the purpose of interstate and foreign commerce, and to give an absolute and unqualified title to such land.

(3.) The court below erred in deciding that the grant to the defendants in error from said commissioners of the land office, as a gift, of the lands in question, which lie under the waters of the Hudson river at a point where the same was actually used for the purpose of interstate and foreign commerce, conveyed to said defendants in error such a title to said lands as would enable them to prevent the use of said lands by the plaintiff in error, which had appropriated a portion of such land to the purposes of interstate commerce and to the construction of a United States post-road prior to the time the aforesaid grant to the defendants in error from the said commissioners of the land office was made.

(4.) The court below erred in holding and deciding that the aforesaid chapter 283 of the Laws of New York of 1850 and the grant to the defendants in error given pursuant to and by virtue of said act were not repugnant to the laws of the United States and were valid, the validity of said statute and of said grant having been drawn in question in said suit on the ground that they were repugnant to the laws of the United States in this respect, to wit:

That by the Revised Statutes of the United States, sec. 3964, the Hudson river at the point in question was made a United States post-road, and the said chapter 283 of the Laws of 1850 and the aforesaid grant to the defendants in error contemplate and intend such application and appropriation of the lands under the waters of said river as will or may, to a greater or less extent, interfere with the usefulness of said river as a post-route.

(5.) The court below erred in holding and deciding that said chapter 283 of the Laws of 1850 of said State of New York and the aforesaid grant thereunder to the defendants in error were not repugnant to the laws of the United States and were valid, the validity of said statute and of said grant having been drawn in question in said suit on the ground of their being repugnant to the laws of the United States in this respect, to wit, that by the laws of the United States, viz., section 5263 of the U. S. Revised Statutes, certain rights and privileges in all the lands under the waters of navigable streams (including the lands in dispute in said action) were given, set apart, and appropriated to the use and benefit of telegraph companies for the promotion of interstate and foreign commerce, and said chapter 283 of the Laws of 1850 and said grant to the defendants in error are calculated and intended to render and do, if valid and effectual, render the rights and privileges thus given by said section 5263 of the Revised Statutes of the United States inoperative, useless, and of no effect as to the lands in question—

And that the said court of appeals should have so held and de-

cided and should have reversed the judgment of the supreme court of the State of New York on said grounds; but the said court of appeals, in fact, decided the contrary thereof and affirmed the said judgment of the supreme court of the State of New York; whereupon, upon the 27th day of October, 1891, the said decision of the court of appeals was made the judgment of the supreme court of the State of New York and judgment of affirmance of the judgment of the supreme court affirming the judgment of the trial court was entered thereupon; and the said The New York and New England Railroad Company prays that the decision of the court of appeals aforesaid and the said judgment of the supreme court of the State of New York aforesaid may be reversed, annulled, and altogether held for naught, and that it may be restored to all things which it has lost by occasion of the said judgment.

WALTER C. ANTHONY,
Att'y for the Pl'ff in Error, Newburgh, N. Y.

[Endorsed:] 14953. Supreme Court U. S., Oct. term, 1891. No. 1479. The New York & New England R. R. Co., pl'ff in error, *vs.* H. S. Rumsey *et al.* Assignment of errors.

[Stamped:] Office Supreme Court U. S. Filed Jan. 14, 1892. James H. McKenney, clerk.

Office Supreme Court
FILED,
MAR 30 1892
JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES.

THE NEW YORK AND NEW ENGLAND RAILROAD COMPANY,
Plaintiff in Error,

Against

HARRIET S. RUMSEY and others,
Defendants in Error.

STATE OF NEW YORK:
County of Orange, ss.

WALTER C. ANTHONY being duly sworn, says that he is the attorney for the plaintiff in error in the above entitled action, and has been such attorney during all the progress of the action from its commencement. That the writ of error herein was not sued out for the purpose of delay; and that the delay caused thereby cannot be productive of any serious harm to the defendants in error for the reason that the judgment of the State courts in this action was not for damages, but that in two other actions, distinct and separate from this, said defendants in error have recovered judgment against the plaintiff in error for their damages—in one case for ten thousand, five hundred dollars, with costs, and in the other for twelve thousand dollars, with costs, which said judgments stand unreversed, and fully secured on appeal, and which are now both in the Court of Appeals of this State, where argument was had upon one of them on the 21st of this current month.

That it is therefore impossible that the delay caused by taking out this writ of error should be productive of any serious harm to the defendants in error.

Deponent further says that the statement of Mr. H. H. Hustis, in folio 10 of his affidavit, that "the Court of Appeals did not even deem the contention" of the plaintiff in error as to the constitutional questions "worthy to write an opinion thereon" is plainly erroneous, the opinion of said court on that point being printed in the record at folio 65—(latter part of the fol.)

And further, deponent saith not.

~~WALTER C. ANTHONY.~~

Walter C. Anthony

Sworn before me,
March 23rd, 1892.

H. W. Terpening

[SEAL.] Notary Public, Orange County.

Office Supreme Court U. S.
FILED.
MAR [illegible] 1892.
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES

NEW YORK AND NEW ENGLAND RAILROAD COMPANY,
Plaintiff in Error,

against

HARRIET S. RUMSEY and others,
Defendants in Error.

Take notice that upon the annexed affidavit of H. H. Hustis, verified the 4th day of March 1892, and upon the record in the above entitled suit and the writ of error, citation, and all the papers and proceedings herein, the defendants in error will move the Supreme Court of the United States at its Court House, in the City of Washington, D. C., on the 4th day of April 1892, at twelve o'clock noon, or as soon thereafter as counsel can be heard, to dismiss the writ of error herein, and will unite with said motion to dismiss, a motion to affirm the judgment of the Court of Appeals of the State of New York herein, on the ground that although the record may show that this Court has jurisdiction, it is manifest the writ was taken for delay only, or that the question upon which the jurisdiction depends is so frivolous as not to need further argument.

Dated, New York, March 7th, 1892.

Yours, &c.,

LAWRENCE GODKIN,
Of Counsel for Defendants in Error,
Office and Post Office Address,
45 William St., New York, N. Y.

To W. C. ANTHONY, Esq.,
Attorney for plaintiff in error,
~~Fishkill on Hudson~~ Newburgh, N. Y.

IN THE SUPREME COURT OF THE UNITED STATES.

NEW YORK AND NEW ENGLAND RAILROAD COMPANY,
Plaintiff in Error,

against

HARRIET S. RUMSEY and others,
Defendants in Error.

STATE OF NEW YORK,
County of Dutchess.

H. H. HUSTIS, being duly sworn, deposes and says as follows: I am an attorney at law of the State of New York, residing at Fishkill, New York, and have been since the commencement of the suit brought by Harriet S. Rumsey and others against the New York and New England Railroad Company, the attorney for the plaintiffs therein, in all proceedings which have been taken in the Supreme Court of the State of New York and the Court of Appeals of said State. The action was commenced in July, 1885, to restrain the defendant from operating its roads upon the plaintiff's lands. The cause has been twice tried and twice appealed to the General term of the Supreme Court of the Second Department of the State of New York, and twice appealed to the Court of Appeals of said State, and the plaintiffs, now the defendants in error, have twice been successful before the said Court of Appeals. The title of the defendants in error to the lands under water upon which the plaintiff in error has trespassed, is derived under a grant made by the Commissioners of the Land Office of the State of New York in 1885, which grant was made in pursuance of Chapter 283 of the Laws of 1850. The said Act of the Legislature of the State of New York has been in operation unrepealed, down to the present time, and since 1850 millions of dollars have been invested upon land in the State of New York, the titles to which come from the Commissioners of the Land Office by the authority given in Chapter 283 of the Laws of 1850, and it would lead to disastrous

10 results and upset the title to lands great in extent and enormous in value, if the said statute should be declared unconstitutional. The question of the constitutionality of said statute under the Federal Constitution was fully argued before the Court of Appeals by the attorney for the plaintiff in error, and the said Court did not even deem the contention worthy to write an opinion thereon. I have fully examined the authorities and have taken the advice of counsel learned in the law, and am myself convinced, and have been advised, that the position taken by the plaintiffs in error that the said statute is repugnant to the Constitution and Laws of the United States is utterly without foundation in law. The alleged Federal question was attempted to be raised by an amendment to the answer, and I believe that the question attempted to be
11 raised thereby is raised for purposes of delay, and that the writ of error to the Supreme Court of the United States based thereon, has been sued out by the attorney for the plaintiff in error solely for purposes of delay, and that the question upon which the jurisdiction of the Supreme Court of the United States is made to depend, is frivolous. I am informed that it will take at least three years for the suit to be heard before this Court on its merits, and it will work great injury to the defendants in error if they are denied their rights during all this intermediate time. The New York Central Railroad, like the New York and New England Railroad, is operating part of its railroad in the vicinity in question over land under water granted to the said railroad by the Legislature of the State of New York, by Chapter 266 of the Laws of 1846, and never, to
12 the best of my knowledge and belief, during all the years that either of said statutes has been in existence, has their constitutionality in relation to the Federal Constitution been questioned by any person or corporation.

Sworn to before me, this 4th day of March, 1892.

J. Hervey Cook
Notary Public

(Seal)

10 results and upset the title to lands great in extent and enormous in value, if the said statute should be declared unconstitutional. The question of the constitutionality of said statute under the Federal Constitution was fully argued before the Court of Appeals by the attorney for the plaintiff in error, and the said Court did not even deem the contention worthy to write an opinion thereon. I have fully examined the authorities and have taken the advice of counsel learned in the law, and am myself convinced, and have been advised, that the position taken by the plaintiffs in error that the said statute is repugnant to the Constitution and Laws of the United States is utterly without foundation in law. The alleged Federal question was attempted to be raised by an amendment to the answer, and I believe that the question attempted to be
11 raised thereby is raised for purposes of delay, and that the writ of error to the Supreme Court of the United States based thereon, has been sued out by the attorney for the plaintiff in error solely for purposes of delay, and that the question upon which the jurisdiction of the Supreme Court of the United States is made to depend, is frivolous. I am informed that it will take at least three years for the suit to be heard before this Court on its merits, and it will work great injury to the defendants in error if they are denied their rights during all this intermediate time. The New York Central Railroad, like the New York and New England Railroad, is operating part of its railroad in the vicinity in question over land under water granted to the said railroad by the Legislature of the State of
12 New York, by Chapter 266 of the Laws of 1846, and never, to the best of my knowledge and belief, during all the years that either of said statutes has been in existence, has their constitutionality in relation to the Federal Constitution been questioned by any person or corporation.

Sworn to before me, this 4th
day of March, 1892.
J. Hervey Cook
Notary Public (Seal)

Office Supreme Court
FILED.
MAR 9 1892
JAMES H. McKENNEY,
Clerk

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1891

No. 1479.

NEW YORK AND NEW ENGLAND RAILROAD COMPANY,
Plaintiff in Error,

AGAINST

HARRIET S. RUMSEY and others,
Defendants in Error.

Brief for Defendants in Error on Motion to dismiss Writ of Error, &c.

LAWRENCE GODKIN,
Of Counsel for Defendants in Error.

In the Supreme Court of the United States.

NEW YORK AND NEW ENGLAND RAILROAD COMPANY, Plaintiff in Error, *against* HARRIET S. RUMSEY, and others, Defendants in Errors.	No. 1479.

BRIEF FOR DEFENDANTS IN ERROR

On motion to dismiss writ of error and affirm judgment, under Supreme Court Rule VI.

STATEMENT.

Defendants in error were in the year 1885, when this action was commenced, and are now, owners of certain uplands in the village of Fishkill Landing on the Hudson river, in the State of New York, said village being bounded on the westerly side thereof by the Hudson river. By Letters Patent from the Commissioners of the Land Office, dated March 3, 1885, they took title to the lands under water in the Hudson river adjacent to the said uplands (Record, p. 7). This grant was made to them under Chapter 283 of the Laws of New York for the year 1850 (Record, pp. 12-13). The railway of the plaintiff in error runs upon a trestle across land under water described in said Letters Patent for about a thousand feet, and the said trestle has been built, and the railroad operated thereon without any permission, right, or authority from the defendants in error (p. 18, fol. 28). The facts as found

the trial Judge will be found at p. 18 of the Record, and the map opposite p. 24, will give a clear idea of the position of the land in question, and the railway of the plaintiff in error.

In 1885 defendants in error commenced this action, and asked an injunction restraining the operation of the said railroad over their said lands under water. The action has been twice appealed to the Court of Appeals of the State of New York, and said Court has affirmed the judgments of the Special and General Term of the Supreme Court of that State, and granted a final injunction restraining the operation of the railroad of the plaintiff in error, and it is to reverse this judgment that the plaintiff in error has sued out a writ of error to this Court, upon the ground that in said suit there was drawn into question the validity of an authority exercised under said State, on the ground of its being repugnant to the Constitution of the United States. (Writ of Error.) The defendants in error now move to dismiss the writ of error and affirm the judgment under Rule VI of the rules of this Court.

First.

The Motion to Dismiss.

The record before the Court is insufficient to raise any Federal question either in the pleadings or the evidence. There is no Federal question raised by the pleadings for the reason that this Court has repeatedly held that upon a writ of error to a State Court "The clause in the Constitution and the law of Congress should have been specified by the plaintiffs in error in the State Court, in order that this Court might see what was the right claimed by them, and whether it was denied to them by the decision of the State Court."

Maxwell *vs.* Newbold, 18 How., 511.
Messenger *vs.* Mason, 10 Wall., 507, 510.
Lawlor *vs.* Walker and others, 14 How., 149.
Commercial Bank *vs.* Buckingham, 5 How., 317.
Medberry *vs.* Ohio, 24 How., 413.

The only allegation in the answer upon the Constitutional point is the general one that the statutes under which the land under water was granted to the defendants in error "are repugnant to the Constitution of the State of New York and of the Constitution and Laws of the United States" (Record p. 3, fol. 4).

If the plaintiff in error should claim that the Federal question appears in the record in its requests to find which were refused by the Court, the answer is that this part of the record is nowhere authenticated as required to be by law and practice of this Court. These requests are incorporated in the record, which is the bill of exceptions. This bill of exceptions is not sufficiently authenticated as required by the Revised Statutes.

(U. S. Rev. Stat., Sect. 953.)

It is not signed by the Judge of the Court in which the cause was tried, or by the presiding Judge thereof, and is therefore entirely insufficient. The bill of exceptions must be signed by the Judge. Even his initials cannot be regarded as a signature or sufficient authentication of the bill, or sufficient evidence for its allowance by the Judge or Court.

Origet *vs.* United States, 125 U. S., 240, 244.
Hanna *vs.* Maas, 122 U. S., 24.
Stimpson *vs.* Westchester R. Co., 3 How., 553.

The record which is before the Court therefore is insufficient in every part to properly raise any Federal question, and the writ should be dismissed.

Second.

If there is color of right to a dismissal, the Court will entertain the motion to affirm.

Even if the Court should be against the defendants in error upon the insufficiency of the record to give the Court jurisdiction, there certainly can be no doubt but that upon the record as it stands, there is at least color of right to a dismissal

and it has been frequently decided that where there is color of right to a dismissal, this Court will entertain a motion to affirm.

Micas *vs.* Williams, 104 U. S., 556.
Chanute City *vs.* Trader, 132 U. S., 210.
Walston *vs.* Nevin, 128 U. S., 578.
Swope *vs.* Leffingwell, 105 U. S., 3.

Third.

The motion to affirm.

The contention that Chapter 283 of the Laws of 1850, of the State of New York, is repugnant to the Constitution and Laws of the United States, is purely frivolous. It was an afterthought, and the point was asserted in the amended answer, simply for the purpose of enabling the plaintiff in error to get a further delay. It has been decided again and again by this Court, that the States are the absolute owners of the navigable rivers, their beds and shores.

Pollard's Lessee *vs.* Hagan, 3 How., 212.
Martin *vs.* Waddell, 16 Peters, 410.
Manchester *vs.* Commonwealth of Massachusetts, 139 U. S., 240.
Wilson *vs.* Blackbird Creek Co., 2 Peters, 245
Smith *vs.* Maryland, 18 How., 71, 74.
McCready *vs.* Virginia, 94 U. S., 391.
Hoboken *vs.* Pennsylvania R. R. Co., 124 U.S.,656.

In the case last cited (Hoboken *vs.* Pennsylvania R. R. Co.), the whole question of riparian grants from the State of New Jersey, was exhaustively considered and this Court adopted and approved the decisions of the Court of Errors of New Jersey, that the State may grant lands under water, not only to the owners of the adjacent uplands, but to others (p. 690). The pretence that the right to grant the soil under navigable waters is repugnant to the Constitutional power to regulate commerce has been put beyond the realm of argument by this Court. In Smith *vs.* Maryland, it was held that the title to the soil under navigable waters within its jurisdiction being vested

in the riparian State, that State could rightfully regulate the rights of fishing therein.

Smith *vs.* Maryland, 18 How., 71.

And in McCready *vs.* Virginia, this Court held that the riparian State is a trustee, not for all the citizens of the United States, but only for its own citizens as to the soil under its navigable waters.

McCready *vs.* Virginia, 94 U. S., 391.

And in Wilson *vs.* Blackbird Creek Co., this Court held that until Congress passed a law regulating the navigation of Blackbird Creek, or of such creeks in general, and while its power to do so, even if it had such power, remained dormant, in such case there could be no such conflict between the Act of the State Legislature and Congress as would render the said act invalid.

In the case at bar there is not a shadow of foundation for the pretense that there exists any statute of the United States to which the statute authorizing the grant of land to defendant in error, is repugnant. In the State Courts the plaintiffs in error cited Sections 3964 and 5263 of the United States Revised Statutes on this point. An examination of these sections will show the Court the frivolity of this pretense.

Fourth.

For a Century Rights of Property have been acquired under the Statute.

Statutes authorizing the Commissioners of the Land Office to grant lands under the waters of navigable rivers in such way "as they should deem necessary to promote the commerce of this State" have been in existence in the State of New York since the year 1786.

People *vs.* Canal Appraisers, 33 N. Y., 466,

and similar or analogous statutes have existed, and their constitutionality has been acquiesced in, in most of the States since the

earliest times of our history; vast rights of property have vested under the authority of these statutes, and this Court will not lend a favorable ear to an attempt to question their constitutionality at this late date, upon the flimsy pretext presented on this writ of error. Practice and acquiescence under a statute for an hundred years afford a weighty, if not irresistible answer, to an attempt to attack its constitutionality.

Stuart *vs.* Laird, 1 Cranch, 299, 308.
Cooley *vs.* Board of Wardens of Philadelphia, 12 How., 299, 315.

Fifth.

The writ of error should be dismissed, and the judgment of the New York Court of Appeals affirmed with costs.

LAWRENCE GODKIN,
Of Counsel for Defendants in Error.

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LAWRENCE GODKIN,
Of Counsel for Defendants in Error.

Office Supreme Court U. S.
FILED.
MAR 30 1892
JAMES H. McKENNEY.
CLERK.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 1479.

NEW YORK AND NEW ENGLAND RAILROAD COMPANY,

Plaintiff in Error,

AGAINST

HARRIET S. RUMSEY and others,

Defendants in Error.

Brief for Plaintiffs in Error. To oppose Motion to dismiss Writ of Error, &c.

WALTER C. ANTHONY,
Atty. for Plaintiff in Error.

—IN THE—

Supreme Court of the United States.

NEW YORK AND NEW ENGLAND RAILROAD COMPANY,
Plaintiff in Error,

against

HARRIET S. RUMSEY, and others,
Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

To oppose motion to dismiss Writ of Error and affirm Judgment of State Courts.

First.

There is no color of right to a dismissal.

The constitutional question was raised distinctly by the answer (folio 4 of the Record), which specifies the state statute alleged to be repugnant to the Constitution and laws of the United States. The clauses of the U. S. Constitution and the Acts of Congress to which said state statute was claimed to be repugnant were clearly pointed out to the trial court (fol. 31 of Record), and passed upon by said court, and exception was duly taken to the decision of that court upon the points so presented (fol. 32 of Record), thus carrying those questions before the Appellate Courts. And they were argued before the court of last resort in New York—the Court of Appeals—and were expressly passed upon by that court in its opinion (the assertion in affidavit of H. H. Hustis to the contrary notwithstanding), as will be seen at fol. 65 of the Record.

At every stage of the case therefore the questions which it is intended to present to this court were distinctly raised and expressly adjudicated.

Second.

The decision of these questions by the trial court—indicated (fol. 31 of Record) by "Refused," &c.—is in strict conformity with the practice in that court and with Sec. 1023 of the Code of Civil Procedure of New York. No signature of the justice is provided for, except in approving the case and ordering it on file (Sec. 997 Code C. P. and Rule 35 of the Supreme Court of New York). This signature appears at the top of page 24 of the Record, and is, in effect, an approval of the entire case (including the requests, findings, refusals and exceptions) down to that point. This is believed to fully answer the matters urged by counsel for defendants in error in the latter part of his first point.

The statute and decisions cited in his brief refer exclusively to the practice in the subordinate Federal courts.

There is therefore no color of right to a dismissal of the Writ of Error, and the motion to affirm the judgment of the state court should not be considered.

Third.

The judgment of the Court below should not be affirmed—certainly not without argument.

The questions sought to be submitted to this court have not been passed upon heretofore. Some of them were alluded to by Chancellor Kent, in Livingston *vs.* Van Duzen, 9 Johns, 520, 521. The case most nearly resembling this is Wilson *vs.* Blackbird Creek, etc., 2 Pet. 245.

This case differs from that, however, in several important particulars, viz:

1st. That was an action between citizens of the same state; this is not. The defendant here is incorporated under the laws of, and its railway is operated in, several states (fol. 30th). It therefore has citizenship in states other than that wherein the plaintiffs reside.

2nd. In the Blackbird Creek case this court assumed, as it fairly might, that the legislature of Delaware had intended a public benefit by their act in question. In this case the statute and water grant forbid any such assumption, and show clearly that the measures which we attack were *not* intended to benefit the public in any respect, but were exclusively "for the beneficial enjoyment" of a private individual.

3rd. In the Blackbird case there was no act of Congress conflicting with the state statute which was drawn in question. In this case the defendant claims that several statutes of the United States will be curtailed in their operation if the plaintiffs water grant (and an indefinite number of others like it) can be held good, and held to convey a title so absolute as to enable the grantees to eject from the premises thus granted parties who had, prior to such grant, used the premises for purposes of interstate commerce and telegraph lines.

Fourth.

The New York statute relative to water grants (Chap. 283, Laws of 1850) is unconstitutional in that it provides for appropriations (by *gift*) to the benefit of private individuals of the lands under water (and thus of the waters above them) to an unlimited extent, without any regard to the public convenience or to the purposes of commerce, after having by the adoption of the U. S. Constitution dedicated such lands and waters to the use of commerce.

A history of the legislation of New York on this subject can be found in The People *vs.* The Canal Appraisers, 33 N. Y. 466, and it will be seen that prior to 1850 the legislature never ventured to attempt to pervert these lands and waters to any use not commercial.

Fifth.

The motion should be denied, with costs.

WALTER C. ANTHONY,
Attorney for the Plaintiff in Error.